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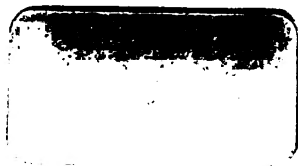


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OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

40

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY JOHN W. KERN,
OFFICIAL REPORTER.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. WILLIAM E. NIBLACK.*†

HON. GEORGE V. HOWK.†‡

HON. BYRON K. ELLIOTT.§

HON. ALLEN ZOLLARS.†

HON. JOSEPH A. S. MITCHELL.||

* Chief Justice at the May Term, 1888.

† Term of office commenced January 1st, 1883.

‡ Chief Justice at the November Term, 1888.

§ Term of office commenced January 3d, 1887.

|| Term of office commenced January 6th, 1885.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
WILLIAM T. NOBLE.

SHERIFF,
MYRON NORTH.

LIBRARIAN,
CHARLES E. COX.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1888, IN THE SEVENTY-
SECOND YEAR OF THE STATE.

116	1
129	4
116	1
151	269

No. 14,330.

THE STATE, EX REL. EWING, v. BELL.

OFFICE AND OFFICER.—*County Commissioner.*—*Enlargement or Abridgment of Term of Office.*—*Legislative Power.*—The office of county commissioner not being provided for by the Constitution, the Legislature may enlarge, abridge, or otherwise change the term of that office, either temporarily or permanently, or may abolish it entirely.

SAME.—*Quo Warranto.*—*Pleading.*—*Complaint.*—In a *quo warranto* proceeding to obtain possession of the office of county commissioner, the point in litigation being the time of the commencement of the official term, a complaint or information which fails to aver when the board of commissioners of the county was organized, or when the term of the first incumbent of the contested office ended, is insufficient, and the want of such averments is not supplied by an allegation as to the time when the county was organized into commissioners' districts.

From the Huntington Circuit Court.

L. P. Milligan and *O. W. Whitelock*, for appellant.

J. B. Kenner and *J. I. Dille*, for appellee.

NIBLACK, C. J.—The complaint or information in this case was substantially as follows:

“The State of Indiana, on the relation of William Ewing,

The State, *ex rel.* Ewing, *v.* Bell.

plaintiff, complains of the defendant, George W. Bell, and gives the court to understand that the county of Huntington was organized into districts, as they now exist, for the election of county commissioners, at the June term, 1839, of the board doing county business, and said districts were numbered one, two and three; and your relator further says that in the year 1839 Nathan Fisher was duly elected and qualified as commissioner for district No. 2, to serve for a term of three years; that his term of office expired in the year 1842, and his successor was elected and entered upon the duties of his office at the close of the term of the said Nathan Fisher; and the succession of said office and the terms thereof have been continuous until the year 1884, when the defendant, George W. Bell, was, at the November election, in said year, duly elected commissioner for said district No. two (2), and during said month of November, 1884, qualified as such commissioner; that the term of office for which he was elected expired on the first Monday of December, 1887, the same being the 5th day of said month.

“And your relator further avers that, at the annual election held on the 2d day of November, 1886, in the county of Huntington and State of Indiana, said relator was a male citizen of the State of Indiana,” over twenty-one years old, a resident of said second commissioner’s district of the county of Huntington, and in all things eligible to the office of commissioner of such district; that at said election the relator received the highest number of votes cast for that office, and was accordingly declared elected to the same; that, on the 11th day of November, 1886, the relator took and subscribed an oath of office, which was endorsed upon his certificate of election; that, on the 5th day of December, 1887, the relator appeared at the room occupied by the board of commissioners of the county of Huntington and demanded possession of the office to which he had been so elected, which was refused; that the defendant unlawfully continued to hold said office, and to intrusively exercise the duties thereof, thus

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ousting and excluding the relator from the possession of the same. Wherefore a writ, in the nature of a writ of *quo warranto*, and all other proper relief, were demanded.

A demurrer was sustained to the complaint, and the defendant had final judgment upon demurrer.

This appeal, therefore, presents only the question whether, upon the facts as stated, the relator is entitled to the possession of the office to which he claims to have been elected.

Since the adoption of biennial elections, and in the application of such elections to the office of county commissioner in the various counties of the State, much doubt and uncertainty have arisen in many cases as to the time at which the term of that office begins, as well as ends.

In an effort to relieve the doubt and uncertainty thus often arising, the General Assembly, on the 7th day of March, 1885, passed an act in the following words:

“Whereas there is uncertainty concerning the times of the beginning and ending of the term of office of county commissioners; and whereas such uncertainty has resulted in much irregularity and in litigation; therefore, for the purpose of preventing litigation,

“Section 1. Be it enacted by the General Assembly of the State of Indiana, that the terms of office of commissioners shall be three years, and shall begin on the first Monday in December, and the terms of office of no two districts in the same county shall begin in the same year; and the year in which the term of office of each district shall begin shall be determined by calculating periods of three years from the end of the term for which the commissioner for the same district was elected upon the organization of the board of commissioners for the county; and each commissioner now holding his office, whose successor has not been elected, and each commissioner-elect who shall hereafter, but prior to the end of the regular term, as provided in this act, for the district for which he was elected, begin his service as commissioner, shall serve three years and to the end of the regular term of said district,

The State, *ex rel.* Ewing, v. Bell.

and until his successor is elected and qualified: *Provided*, That this act shall not be construed so as to lengthen the term of office of any commissioner now holding his office, whose successor has been elected and qualified, to the end of the regular term as provided in this act, for the district for which he was elected, and no commissioner hereafter elected shall, if his successor is elected and qualified, hold his office beyond the end of the regular term of office for his said district." Acts of 1885, 69.

The office of county commissioner is not provided for, nor is its term prescribed, by the Constitution. See sections 2 and 3, article 6, of that instrument. It is, therefore, competent for the Legislature to enlarge, abridge, or otherwise change the term of that office, whether temporarily or permanently, as well as to abolish the office entirely, if it shall be deemed expedient to do so.

Except in so far as it fixes the first Monday in December as the day of the commencement of the term of a county commissioner, the act above set out is merely declaratory of what the law on the subject to which it relates has been since county commissioners were first elected in this State. *Par-mater v. State, ex rel.*, 102 Ind. 90; *State, ex rel., v. Barlow*, 103 Ind. 563.

As has been shown, the act of 1885 requires that the time at which the term of a county commissioner begins in any given district "shall be determined by calculating periods of three years from the end of the term for which the commissioner for the same district was elected upon the organization of the board of commissioners for the county."

As has been further shown, the complaint or information in this case averred "that the county of Huntington was organized into districts, as they now exist, for the election of county commissioners, at the June term, 1839, of the board doing county business" for that county, and that Nathan Fisher was elected in said year county commissioner from the second district to serve, as he did serve, for three years.

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The election of county commissioners for the transaction of county business was authorized by the act of January 19th, 1831, R. S. 1831, 129, and that act was in force when the county of Huntington was permissively organized by the act of February 1st, 1834. Acts of 1834, 65.

The third section of this latter act directed that "The circuit court and the board of county commissioners, when elected under the writ of election from the executive department, shall hold their sessions as near the center of the county as a convenient place can be had, until the public buildings shall have been erected."

The fifth section of the act imposed upon the board of commissioners, at their first meeting after their election, the duty of appointing some suitable person to assess and collect the State and county revenue for the county of Huntington.

The fair inference consequently is, that a board of commissioners for the county of Huntington was organized several years previous to June, 1839. At all events, the complaint or information failed to aver when the board of commissioners for that county was organized, or when the term of the first commissioner elected for the second district ended.

The allegation that the county of Huntington was organized into commissioners' districts, as they now exist, in June, 1839, does not supply the place of such an averment, which was material to the merits of the relator's claim to the office in question.

There was, therefore, no error in the holding that the complaint or information was insufficient upon demurrer.

As the judgment in this case will not be a bar to further similar proceedings, if such shall be instituted, it is, perhaps, well to remark that the information was, in other respects, seemingly sufficient in its substantial allegations, within the rule prescribed by the cases of *Reynolds v. State, ex rel.*, 61 Ind. 392, and *Jones v. State, ex rel.*, 112 Ind. 193.

It would, however, have been more definite, and hence more

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formal, if it had stated the time at which the term of the defendant, Bell, commenced, and the length of time which the relator had resided in the district for which he claimed to have been elected commissioner. See Constitution, section 4, article 6. As having some relation to the subject-matter here involved, see the cases of *State, ex rel., v. Bemenderfer*, 96 Ind. 374, and *Parcel v. State, ex rel.*, 110 Ind. 122.

The judgment is affirmed, with costs.

Filed Oct. 12, 1888.

No. 14,507.

SAXON v. THE STATE.

SUPREME COURT.—Practice.—Record.—Bill of Exceptions.—Evidence.—Where the record on its face affirmatively shows that all the evidence given on the trial is not contained therein, the Supreme Court will not consider any question growing out of the evidence, although the bill of exceptions concludes with the statement that “this was all the evidence given in the cause.”

SAME.—Omitted Evidence.—The Supreme Court has no power to make omitted evidence a part of a bill of exceptions or of the record.

From the Blackford Circuit Court.

J. A. Bonham, A. E. Steele and J. A. Kersey, for appellant.
S. W. Cantwell, Prosecuting Attorney, for the State.

Howk, J.—Appellant, Saxon, was prosecuted in this case for an unlawful sale of intoxicating liquor in a less quantity than a quart at a time. Upon his arraignment and plea of not guilty, the issues joined were tried by a jury, and a verdict was returned finding him guilty as charged, and assessing

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his punishment at a fine in the sum of twenty dollars. Over his motion for a new trial, judgment was rendered on the verdict.

The only error complained of here by the appellant is predicated upon the overruling of his motion for a new trial. In such motion the causes assigned for such new trial were, that the verdict of the jury was not sustained by the evidence, and that it was contrary to law. It is manifest from these causes for a new trial that appellant asks for the reversal of the judgment herein solely on the ground that the verdict of the jury was not sustained by sufficient legal evidence. The question presented by the error complained of, therefore, is one which depends for its proper decision upon all the evidence given on the trial of the cause. If, therefore, it affirmatively appears that all the evidence given on the trial of this cause is not in the record now before us, it is settled by many decisions of this court that the question presented here will not be considered and decided. *French v. State, ex rel.*, 81 Ind. 151; *Shimer v. Butler University*, 87 Ind. 218; *Fellenzer v. Van Valzah*, 95 Ind. 128; *Collins v. Collins*, 100 Ind. 266; *Beatty v. O'Connor*, 106 Ind. 81; *Garrison v. State*, 110 Ind. 145; *Cowger v. Land*, 112 Ind. 263.

This is so even where the bill of exceptions, which purports to contain the evidence, concludes with the usual statement that "this was all the evidence given in the cause," if, as in the case under consideration, the bill elsewhere discloses the fact that evidence, which is not included in such bill, was offered and admitted on the trial of the cause. In this case the bill of exceptions shows on its face that it does not contain all the evidence given in the cause. If the omitted evidence might have been made a part of the bill by referring thereto, and designating its appropriate place by the words "here insert," under the provisions of section 626, R. S. 1881 (a question we do not decide), such bill does not contain the words "here insert."

The omitted evidence could only be made a part of the

Danley *et al.* v. Scanlon, by Next Friend.

bill of exceptions, if at all, by the trial court. It is certain that this court has no power to make such omitted evidence a part of the bill of exceptions or of the record on this appeal. For this reason, appellant's motion for an order requiring the clerk of the court below to insert such omitted evidence in the record of this cause must be and is overruled.

We can not say from the record now before us that the court below erred in overruling appellant's motion for a new trial herein, and, therefore, we must hold that no such error was committed.

The judgment is affirmed, with costs.

Filed Oct. 12, 1888.

No. 13,170.

DANLEY ET AL. v. SCANLON, BY NEXT FRIEND.

MASTER AND SERVANT.—*Dangerous Machinery.*—*Notice.*—*Pleading.*—*Complaint.*—A complaint for damages for personal injuries, which proceeds upon the theory that the plaintiff, an inexperienced boy, fifteen years of age, was put to work with machinery which his employers knew to be dangerous, but of which danger they did not inform him, is sufficiently specific as to the character of the machinery if it avers that there was danger in operating it, and that it was dangerous in the particular which caused the injury.

CONTINUANCE.—*Practice.*—*Filing New Paragraph of Complaint.*—Where, after the jury has been empanelled in the second trial of a cause, an additional paragraph of complaint is filed, which introduces a new theory as to the cause of action, a verified application for a continuance, which shows that the defendant is unprepared with evidence to meet the allegations of the new paragraph, and that if time is allowed such evidence can be

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adduced, should be granted, and the refusal to entertain such application is error.

From the Hendricks Circuit Court.

L. B. Swift, E. G. Hogate and R. B. Blake, for appellants.
R. Hill and W. H. Martz, for appellee.

ELLIOTT, J.—The appellee alleges in the first paragraph of his complaint that he was employed by the appellants to work in a planing-mill, as he might be directed by them; that he was fifteen years of age, and inexperienced in such work; that he was put to work upon a planing and moulding machine of many and varied parts, and while at work a sliver flew off from the plank he was putting through the planer and struck him in the eye, and destroyed it; “that there was great danger, and liability of being injured, to the person operating with and upon said planer and moulding machine, in the condition it then was, from splinters and slivers that were liable to and did break off of the lumber which the plaintiff was directed to dress and plane;” that the plaintiff was ignorant of the danger, but the defendants knew of it and did not inform him.

The appellants unsuccessfully moved the court to make the averment of the pleading concerning the planer more specific. We think that there was no error in overruling this motion. The theory of the pleading is, that the defendants negligently set the plaintiff at work upon machinery known to them to be dangerous, but of which danger the plaintiff was ignorant. The complaint does not proceed on the theory that the machinery was negligently suffered to become dangerous for the lack of repair or the like, but on the theory that it was an actionable wrong to put a young and inexperienced boy at work upon a dangerous machine without giving him warning of the danger. It was not necessary, therefore, to do more than aver that there was danger in operating the machine, and that it was dangerous in the particular which caused the injury. This was done when it was averred that

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it was dangerous because of the liability of slivers and splinters to fly off and injure the person operating it.

After the jury had been empanelled the appellee filed a second paragraph of complaint. To the filing of this paragraph the defendants objected, and one of them filed an affidavit wherein it was stated: "The filing of the second paragraph of the complaint has prejudiced the defendants in the preparation of this cause for trial, in that they have not made any sufficient preparation to meet the testimony that may be adduced under said paragraph tending to show that there was any fault or imperfection in the original construction of the machine therein mentioned, or of any of the parts thereof, on account of its not being sufficiently guarded to prevent splinters from flying through the same, and that if time is allowed they can and will bring it into court for the inspection of the jury."

On this affidavit a continuance was asked. The court erred in overruling this motion.

We have seen that the first paragraph proceeds on the theory that the machine was intrinsically dangerous. The second paragraph avers that the machine "was not in good and safe condition, nor was the same properly guarded to prevent the escape of chips, slivers and splinters," and that, "by reason of said defective condition of said planer, a sliver was thrown from it into the eye of the plaintiff." There is an essential difference between the two paragraphs, for the second relies upon the defective condition of the planer as the cause of action. The case had once been tried in the Marion Superior Court upon the first paragraph of the complaint, and a verdict in the appellee's favor set aside. A change of venue was then taken to the Hendricks Circuit Court, and it was after the jury was empanelled on the second trial that the second paragraph of the complaint was filed. Under these circumstances a continuance should have been granted.

Judgment reversed.

Filed May 18, 1888; petition for a rehearing overruled Oct. 11, 1888.

The State v. Vanderbilt.

No. 14,475.

THE STATE v. VANDERBILT.

CRIMINAL LAW.—*Supreme Court.*—*Appeal by State.*—*Record.*—*Bill of Exceptions.*—On an appeal by the State in a criminal cause, whatever is a part of the record without a bill of exceptions need not be embraced in such bill, and where the question of law reserved is shown by the record proper, no bill of exceptions is necessary.

SAME.—*Teacher and Pupil.*—*Rules for Government of School.*—*Unreasonable Rule.*—A rule established by the teacher of a public school, requiring pupils to pay for the wanton and careless destruction of school property is unreasonable, and a teacher has no right to enforce such a rule by chastisement.

From the Warren Circuit Court.

L. T. Michener, Attorney General, *J. W. Sutton* and *W. L. Rabourn*, for the State.

C. V. McAdams, for appellee.

ZOLLARS, J.—Appellee was tried and acquitted in the court below upon a charge of assault and battery. A bill of exceptions, presented by the prosecuting attorney and signed and filed at the time the exceptions were taken, shows that the State, by the prosecuting attorney, excepted to the giving of an instruction by the court, and also excepted to the refusal of the court to give an instruction asked by the prosecuting attorney.

The case seems to have originated before a justice of the peace. The clerk, in making the record for this appeal, has set out the affidavit upon which appellee was tried, and which was filed in his office by the justice of the peace, on appeal from his court, together with the proceedings in the circuit court, including the verdict and judgment of acquittal, and also the bill of exceptions.

Counsel for the State contend that the court below erred in the giving of the one instruction and in the refusal of the

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other. Counsel for appellee, on the other hand, contends that there is no question before this court for decision, for the reason that the appeal was not taken in the manner prescribed by the statute.

He insists that this court can not determine whether there was error in the giving or refusal of the instructions, unless it is in some proper way advised of the nature of the charge upon which appellee was tried, and that we can not look beyond the bill of exceptions to the affidavit set out in the record to determine what the charge was.

Section 1846, R. S. 1881, provides that "The prosecuting attorney may except to any opinion of the court during the prosecution of any cause, and reserve the point of law for the decision of the Supreme Court. The bill of exceptions must state clearly so much of the record and proceedings as may be necessary for a fair statement of the question reserved."

Section 1883, R. S. 1881, provides that "In case of an appeal from a question reserved on the part of the State, it shall not be necessary for the clerk of the court below to certify, in the transcript, any part of the proceedings and record except the bill of exceptions and the judgment of acquittal. When the question reserved is defectively stated, the Supreme Court may direct any part of the proceedings and record to be certified to them."

Applied to a case like this, the strict construction put upon the above sections of the statute by appellee's counsel is not sustained by our cases. They are, in effect, that on such appeal by the State, what is a part of the record without a bill of exceptions need not be embraced in such bill, and that where the question of law reserved is shown by the record proper, no bill of exceptions is necessary. *State v. Day*, 52 Ind. 483; *State v. Bartlett*, 9 Ind. 569; Gillett Criminal Law, section 1004.

Those cases require that in this case we shall regard the affidavit as a part of the record, and that we shall look be-

The State v. Vanderbilt.

yond the bill of exceptions to it to ascertain what the charge against appellee was.

Looking to the record before us as a whole, we think that it sufficiently presents the question as to whether or not a teacher of a public school may establish, and enforce by chastisement, a rule requiring pupils to "pay for the wanton and careless destruction of school property."

The bill of exceptions shows that the State, by the prosecuting attorney, asked the court to charge the jury "that a teacher in a public district school has no right to inflict a money penalty upon a pupil for the accidental destruction or breakage of school property, and enforce the same."

That instruction the court refused, and over the exception of the State gave the following instruction :

"A rule of the teacher, requiring that the pupil shall pay for the wanton and careless destruction of school property, is a reasonable rule, and one that the teacher has the right to enforce."

It is not necessary that the evidence should be in the record to enable us to pass upon these instructions, if in any case on appeal by the State the evidence can be examined, a question which we leave where it is left by our cases. Without speaking of the instruction refused, which is the opposite of that given, the latter, if erroneous, would be erroneous under any supposable state of the evidence.

Under our cases, a school teacher has the right to exact from pupils obedience to his lawful and reasonable demands and rules, and to punish for disobedience, "with kindness, prudence and propriety." And where, in such case, the punishment is not administered with unreasonable severity, a proceeding for an assault and battery can not be maintained against the teacher. *Danenhoffer v. State*, 69 Ind. 295 (35 Am. R. 216).

The rule or rules to which the teacher may thus enforce obedience must, however, be reasonable, and whether or not

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such rules are reasonable is ultimately a question for the courts. *Fertich v. Michener*, 111 Ind. 472.

We think that a rule requiring pupils to pay for school property which they may wantonly and carelessly break or destroy, is not a reasonable rule, and, therefore, that teachers have no right to make and enforce such a rule by chastisement of the pupils. The "wanton and careless destruction," etc., amounts to nothing more than carelessness. *Lafayette, etc., R. R. Co. v. Huffman*, 28 Ind. 287; *Terre Haute, etc., R. R. Co. v. Graham*, 95 Ind. 286, 296 (48 Am. R. 719).

Carelessness on the part of children is one of the most common, and yet one of the least blameworthy of their faults. In simple carelessness there is no purpose to do wrong. To punish a child for carelessness in any case is to punish it where it has no purpose or intent to do wrong or violate rules.

But beyond this, no rule is reasonable which requires of the pupils what they can not do. The vast majority of pupils, whether small or large, have no money at their command with which to pay for school property which they injure or destroy by carelessness or otherwise. If required to pay for such property, they would have to look to their parents or guardians for the money. If the parent or guardian should not have the money, or if they should refuse to give it to the child, the child would be left subject to punishment for not having done what it had no power to do.

Without giving other reasons for our conclusion that the rule in question was an unreasonable rule, our judgment is that the court below erred in giving the instruction above set out, and that this appeal must be sustained, and the appellee taxed with the costs on appeal.

Filed Oct. 12, 1888.

The City of Logansport v. Dykeman *et al.*

No. 13,666.

THE CITY OF LOGANSPORT v. DYKEMAN ET AL.

MUNICIPAL CORPORATION.—City.—Contract.—Complaint.—General Averment of Contract.—Presumption.—In an action against a city for services rendered in securing the settlement of its indebtedness, where there is an averment in the complaint that such city entered into a contract with the plaintiff, whereby the latter undertook and agreed, in consideration, etc., it will be presumed that whatever was necessary to be done by the common council, in respect to its records in relation to entering into such contract, was properly done; and no additional averment as to the manner of executing the contract is necessary.

SAME.—Contract for Service.—Ordinance, Resolution or Writing not Necessary.—In the transaction of mere matters of business, such as the purchase of goods necessary for the welfare of a municipal corporation, or the employment of persons or agencies to perform service for or protect the interests of the municipality, a formal ordinance, by-law or resolution is not necessary, nor is it essential that contracts of that character be in writing.

SAME.—Contract with Attorney.—Acceptance of Service.—Estoppel.—Where the common council of a city, properly convened, enters into a contract with an attorney, or where an attorney is employed through the agency of a committee or other authorized person, and has performed services of which the municipality has accepted the benefit, it may not afterwards object that the contract was not in writing, or that the vote of the council, on the question of employment, does not appear upon its records.

SAME.—Contracts within Scope of Corporate Power.—City Bound Same as Individual.—In respect to contracts which are within the ordinary corporate power of a city, and in relation to which no statutory requirements are laid down, or mode of procedure prescribed, such city will be bound by its contracts, and will be affected by the principles of ratification, in the same manner as an individual.

SAME.—Bound by Implied Contracts.—Evidence.—A municipal corporation will be bound by implied contracts or agreements to pay for services performed for it at its request, relating to matters within the scope of its powers, and such implied agreements may be deduced by inference from authorized corporate acts, without either a vote or writing.

SAME.—City Indebtedness.—Constitutional Limit.—Constitutional Law.—Contract for Service Creating Additional Debt.—Although the debt of a city may be actually or nominally up to the constitutional limit, the provi-

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162	54
116	15
167	256
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171	127

The City of Logansport v. Dykeman *et al.*

sions of article 13 of the Constitution will not operate to invalidate a contract made by its common council, agreeing to pay an attorney for services to be rendered in compromising or contesting any part of such indebtedness.

PARTIES.—*Abatement.*—*Party Interested Made Defendant to Answer to Interest.*—It affords no ground for the abatement of an action, nor in bar thereof, that a party really or nominally interested is made a defendant to answer to his interest instead of suing as plaintiff.

EVIDENCE.—*City.*—*Report of Committee.*—*Admission.*—In an action against a city to recover on a contract for professional services, the report of a committee of the common council, on the subject of the performance of such contract, which is in the nature of an admission that the council had notice of the contract, and that the plaintiff was proceeding under it, is admissible in evidence.

PRACTICE.—*Instruction.*—*Modification of by Court.*—The court may modify instructions asked, even after indicating, according to the requirement of the statute, what instructions would be given and what refused.

From the Cass Circuit Court.

D. H. Chase and *Q. A. Myers*, for appellant.

D. C. Justice and *D. P. Baldwin*, for appellees.

MITCHELL, J.—This was a suit brought by David D. Dykeman and George C. Taber against the City of Logansport to recover the amount which, it is alleged, the city agreed to pay the plaintiffs for the services of the appellee Dykeman in effecting a compromise and settlement of a large outstanding bonded indebtedness against the city in the year 1885.

William T. Wilson, a partner in business with the plaintiffs, was made a party defendant, to answer, it being alleged in the complaint that he had no interest in the claim against the city, he having assigned or surrendered his interest therein to the plaintiffs.

It is averred that the *Ætna Insurance Company*, of Hartford, Connecticut, held bonds theretofore issued by the city of Logansport, amounting to \$80,000 principal and \$61,000 of accumulated and overdue interest. Suit had been commenced and was then pending against the city to enforce payment of the bonds and interest, amounting to \$141,000.

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Thereupon, on the 4th day of February, 1885, the city of Logansport, as it is alleged, entered into a contract with the plaintiff Dykeman, by the terms of which the latter undertook and agreed to effect a compromise, and settle with the holders of the bonds and coupons, and procure the indebtedness to be cancelled and surrendered up to the city upon such terms as might be agreed upon by the common council of the city and the holders, for which services the city promised and agreed to pay him 5 per cent. of the amount of the reduction which he might secure from the principal and interest of the bonds and coupons.

It was further provided that in case the plaintiff should fail to secure a compromise and reduction satisfactory to the common council of the city, he was to receive no compensation for his services except the sum of one hundred dollars, which was to be paid toward his expenses.

It is averred that he entered upon the performance of his contract, that the city paid him one hundred dollars out of its treasury for his expenses, and that he secured a compromise which was acceptable to the city, the result of the settlement being that the bonds and interest coupons above mentioned were surrendered up and cancelled upon the payment by the city of \$95,000, thus saving the sum of \$46,000.

The plaintiffs claim that the city became indebted to them in the sum of \$2,300, that amount being 5 per cent. of the reduction secured by the services of the appellee Dykeman.

The complaint was held good on demurrer, and this ruling is one of the grounds upon which error is predicated.

The argument on behalf of the appellant is based upon the proposition "that a common council of a city can only enter into a contract for personal or professional services by a record." Hence it is contended, since it does not appear by averment in the complaint in the present case that the contract which the plaintiffs rely upon was entered of record and adopted by taking the yeas and nays, as is required upon the

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adoption of a by-law, ordinance or resolution, that it afforded no right of action, and that the court below erred in not sustaining the demurrer to the complaint.

The averment in the complaint in that regard is general, and to the effect that, on the 4th day of February, 1885, the city of Logansport entered into a contract with the plaintiffs whereby the appellee Dykeman undertook and agreed that in consideration, etc.

Under this averment it must be presumed that whatever was necessary to be done by the common council, in respect to its records in relation to entering into the contract relied on by the plaintiffs, was properly done. *Over v. City of Greenfield*, 107 Ind. 231.

It is quite true that section 3099, R. S. 1881, declares that "On the passage or adoption of any by-law, ordinance, or resolution, the yeas and nays shall be taken, and entered on the record." This is to the end that in acting upon matters of a *quasi* judicial, or of a legislative character, in which the public is concerned, or which may affect the persons or property of citizens, each member of the common council shall be obliged to assume his full measure of responsibility by putting himself upon record, and thus indicating his attitude in regard to the matter in question. *Steckert v. City of East Saginaw*, 22 Mich. 104.

It is a mistake to suppose, however, that in the transaction of mere matters of business, such as the purchase of goods necessary for the welfare of the corporation, or the employment of persons or agencies to perform service for, or to protect the interests of, the municipality, a formal ordinance, by-law or resolution must be adopted, and the yeas and nays taken and entered of record. Cities are authorized, upon conditions prescribed, to issue bonds, to incur liabilities, to purchase and own property, and to employ various agencies in conducting the business affairs which concern the municipality. *City of Indianapolis v. Indianapolis Gas-Light*,

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etc., Co., 66 Ind. 396; *Leeds v. City of Richmond*, 102 Ind. 372.

As a consequence, they have the incidental power to compromise and adjust disputed claims, and to employ agents or attorneys to accomplish that end. The statute does not prescribe the method by which contracts of that character are to be made, nor that such contracts must be in writing. The method of adopting, and the form of such contracts, are, therefore, matters within the discretion of the council. Of course the proper and business-like way would require that the employment should appear upon the record of the proceedings of the common council, but the record is not necessarily the contract, although it may afford the most satisfactory evidence of the fact that a contract was made. Where, however, a common council, properly convened, enters into a contract with an attorney, or where an attorney is employed through the agency of a committee or other authorized person, and has performed services of which the municipality has accepted the benefit, it will be too late, when he asks to be compensated for his services according to the agreement, to object that the contract was not in writing, or that the vote of the council does not appear upon the record of its proceedings. In respect to such contracts, a municipal corporation may be bound by the acts of its properly authorized agents, substantially as a natural person. *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Township of Norway v. Township of Clear Lake*, 11 Iowa, 506.

Cases involving contracts for street improvements, and those in which certain precedent steps are required to be taken before a common council can acquire jurisdiction to contract at all, or where the statute requires that the contract be made in a certain form, or in pursuance of a certain mode, bear no analogy to the present case. In such cases the common council exercise a special statutory power in relation to the contract, and where a mode of procedure is prescribed, and the conditions and form of the contract are matters of

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statutory regulation, both the mode of procedure and form of the contract must be substantially observed. *City of Logansport v. Humphrey*, 84 Ind. 467; *Driftwood, etc., Turnpike Co. v. Board, etc.*, 72 Ind. 226.

On the other hand, where the contract is one which the corporation has the incidental power to make, independently of any statute, in order that it may execute powers expressly conferred, and carry out the purposes of its being, the rule that such contracts are not void merely because there is no written evidence of them, or because of the absence of some mere formality, is now too firmly settled to be shaken. *Ross v. City of Madison*, 1 Ind. 281 (48 Am. Dec. 361); *School Town of Princeton v. Gebhart*, 61 Ind. 187; *State, ex rel., v. Hauser*, 63 Ind. 155 (182); *McCabe v. Board, etc.*, 46 Ind. 380; *Leeds v. City of Richmond, supra*; *City of Terre Haute v. Terre Haute Water-Works Co.*, 94 Ind. 305; *White v. State*, 69 Ind. 273; *City of Logansport v. Crockett*, 64 Ind. 319; *Langdon v. Town of Castleton*, 30 Vt. 285; 1 Dillon Munic. Corp., sections 479, 463.

A broad distinction exists, and must be kept in view, between those cases in which a municipality, or some one through its authority, seeks to avail itself of the contract or proceedings of a common council in order to impose a burden upon the property of another, or to affect the rights of others, and those in which the neglect or omission of the common council, or other officer of a city, to observe some mere matter of form, is interposed in order to deprive a person of compensation for services rendered for the municipality, in respect to a matter in which no formality whatever is required. 1 Dillon Munic. Corp., section 449.

In respect to contracts which are within the ordinary corporate powers of a city, and in relation to which no statutory requirements are laid down, or mode of procedure prescribed, a municipal corporation will be bound by its contracts, and will be affected by the principles of ratification, in the same manner as an individual.

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If the contract could have been made in the first instance without any particular or prescribed conditions or formalities, it being within the corporate authority and a necessary incident to enable it to execute its functions, it may be ratified in like manner. *Cullen v. Town of Carthage*, 103 Ind. 196 (53 Am. R. 504); 1 Dillon Munic. Corp., sections 463, 464; *Bass Foundry and Machine Works v. Board, etc.*, 115 Ind. 234; *Corporation of Bluffton v. Studabaker*, 106 Ind. 129.

So, also, in respect to services performed for a corporation at its request, if the services relate to a matter within the scope of its powers, the corporation will be bound by an implied contract or agreement to pay, and such implied agreement may "be deduced by inference from authorized corporate acts, without either a vote, or deed, or writing." 1 Dillon Munic. Corp., section 459.

The court committed no error in overruling the demurrer to the complaint.

Several paragraphs of the answer presented defences arising under article 13 of the Constitution, relating to the limitation upon municipal indebtedness. As has already been seen, the complaint shows that the result of the contract with the plaintiffs was to reduce the corporate indebtedness from \$141,000 to \$95,000.

The answers, in effect, confess these averments in the complaint, but say that the contract to pay 5 per cent. is within the constitutional inhibition, because the city was already indebted in an amount beyond the limit of the Constitution.

The contract with the plaintiffs did not contemplate the creation of a new or additional debt. It was a contract for services to be rendered in securing the reduction of an existing debt. Certainly it never was intended that a municipality, whose indebtedness was actually or nominally up to the constitutional limit, might not contract for the services of an agent or attorney to contest the validity of the whole or any part of its indebtedness, and secure a reduction of the

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amount thereof. To give the Constitution such a construction would effectually tie the hands of municipalities, so to speak, and disable them from entering into any arrangement for refunding or reducing the amount of their pre-existing indebtedness by new promises to pay, or by any arrangement looking to a compromise. *Powell v. City of Madison*, 107 Ind. 106, and cases cited.

There are some other questions discussed of minor importance relating to questions raised by other answers, some of which are treated as pleas in abatement. It is quite sufficient to say that after an attentive consideration of the argument in appellant's behalf, we have discovered no error in the rulings of the court in that connection. The facts pleaded in abatement were not matter which went to abate the suit. They went to the merits. *Morningstar v. Cunningham*, 110 Ind. 328.

It affords no ground for the abatement of an action that a party really or nominally interested is made a defendant to answer to his interest, instead of suing as a plaintiff. *Durham v. Hall*, 67 Ind. 123.

In either case his rights under the contract would be barred by the event of the suit. Nor were the facts pleaded sufficient as an answer in bar. It was no cause of concern to the city if the defendant Wilson was content that it should be adjudged that he had no interest in the contract.

Some questions presented by the motion for a new trial, such as the overruling of the appellant's motion for a continuance on account of the absence of Mr. Tomlinson, and the objection that certain of the jurors were selected from the by-standers instead of being regularly drawn by the jury commissioners, have been duly considered. In respect to those matters the court acted within its discretion, and there was no error in its rulings. *Deig v. Morehead*, 110 Ind. 451; *Heyl v. State*, 109 Ind. 589.

It is contended that the motion for a new trial should

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have been sustained because the verdict of the jury is contrary to law and contrary to the evidence.

This contention is predicated upon the proposition that the common council of the city was not lawfully convened at the time the contract was entered into with the plaintiffs. Without attempting to detail the facts in that connection, it may be conceded, for the purposes of this case, that the meeting of the common council at the time referred to was informal. It is, however, beyond dispute, that at a meeting attended by eight of the ten members of the common council, presided over by the mayor, and in the presence of the city attorney, the contract relied on was made.

The evidence fully justifies the conclusion, that after the contract was thus entered into the plaintiff Dykeman proceeded to consummate what he had undertaken on behalf of the city, and that the mayor, city attorney and common council all knew that he was acting for the city, in pursuance of the contract thus made.

The council met again and again, every member thereof having complete knowledge of what had been agreed upon, and of what was being done under the contract. So far as the record discloses, there was not one word of dissent, nor any attempt at any subsequent meeting to abrogate or set aside the action taken at the informal meeting of the mayor and council. The one hundred dollars which the council agreed to pay toward expenses had been paid by the city treasurer, and the payment regularly reported through the proper committee to the common council. This report appears to have been regularly confirmed. Finally, after months of negotiation and effort, a compromise was effected by the plaintiff Dykeman, which was accepted by the common council of the city. The city, as a result, received the surrender of its bonds and interest coupons to the amount of \$141,000, and, after the consummation of the whole matter, it now seeks to go back and question the regularity of

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the meeting at which the contract, under which the plaintiffs performed the service, was made.

With all the diligence and laborious research of counsel, they have presented no authority which would support a holding that the contract, even though not regularly made in the beginning, had not been so ratified and adopted by the subsequent acquiescence and affirmative conduct of the common council as to authorize a recovery. We do not for a moment doubt the proposition, so abundantly supported by appellant's counsel, that a municipal corporation can not be bound by the ratification of a contract which it had no power to make, or which had been made in disregard of a mode prescribed by the statute.

The principles of ratification can not be invoked to help out or enlarge the power of a corporation to make contracts, or to cure or supply defects, in case the prescribed mode of contracting has been disregarded, but we have already pointed out that the present case is within the rule which applies the principles of ratification to the contracts of municipal corporations, the same as to those of individuals.

The common council having assumed to contract concerning a business matter which was entirely within its discretion, both as to the time and mode of contracting, and having acquiesced in the performance of the contract, and accepted the results of the service performed under it, they must now be held to have ratified the original contract, so as to have made it as binding as though it had been adopted at the outset in a manner entirely beyond question.

The case is not distinguishable in principle from *Sullivan v. School Dist. No. 39*, 18 Pac. Rep. 287, in which it was held by the Supreme Court of the State of Kansas, as stated in the head-note, that a contract for building a school-house, void because made by only one member of the school board, may afterwards be ratified and made binding upon the district by the full school board. See, also, *Albany City Nat'l Bank v. City of Albany*, 92 N. Y. 363.

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The next question relates to the ruling of the court in admitting in evidence the report made to the common council by the claims committee, to whom was referred the claim of the plaintiff for compensation under the contract.

This report purports to state the fact and manner of the employment of Mr. Dykeman, the various steps taken by him in bringing about a settlement, and it sets out copies of letters and telegrams sent and received by him, all of which were laid before the mayor and various committees of the council during the progress of his negotiations for a compromise. It also recites the terms of the final compromise agreed upon, and it concludes with an appended statement by the city attorney, to the effect that in his opinion the services of Mr. Dykeman were instrumental in bringing about the settlement, and that he ought to be paid according to the agreement. The report seems to have been objected to as an entirety.

It was admitted upon the theory that it was in the nature of an authentic declaration, tending to show that the common council had notice of the contract which had been entered into with the plaintiffs, and that the mayor and council were advised from time to time, by the reports and correspondence which were laid before them, of the progress of events under the contract, and that the agreement entered into had, therefore, been acquiesced in and ratified by the knowledge and conduct of the common council.

To the extent that the report of the committee was in the nature of an admission that the common council had notice of the contract, and that the appellee Dykeman was proceeding under it, it was properly admitted in evidence. *City of Delphi v. Lowery*, 74 Ind. 520 (39 Am. R. 98).

It must have been, in any event, harmless as evidence, for the reason that the matters therein recited do not seem to have been in serious dispute. The opinion and recommendation of the city attorney were not admissible in evidence for any purpose, but as we have been unable to discover any

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separate objection or motion addressed to that feature of the report, no question in that regard is presented by the general objection to the report. Counsel for the city mistake the condition of the record, in assuming and asserting that it shows a separate objection to the opinion of the city attorney.

Some questions are made in relation to the giving and refusing certain instructions, but these have been incidentally determined in consonance with the ruling of the court by what has been said upon the sufficiency of the complaint and the subject of ratification. They need not be adverted to again.

The court very clearly had the right to modify the instructions asked, even after indicating, as the statute requires, what instructions would be given and what refused. It would be a travesty upon the administration of justice if a court was compelled to give an erroneous instruction, simply because it had acted incautiously in indicating what instructions would be given.

The evidence tends to sustain the verdict and findings of the jury:

While we have not separately stated each of the numerous questions made upon the briefs, we have examined them all.

We find no error. The judgment is affirmed, with costs.

Filed June 21, 1888; petition for a rehearing overruled Oct. 9, 1888.

McKittrick v. Glenn *et al.*

No. 14,058.

MCKITTRICK v. GLENN ET AL.

116	27
156	428
116	27
162	534

NEW TRIAL.—*As of Right.*—*Action to Cancel Deed and Revest Title.*—In an action by a grantor to set aside a deed and revest title, on the ground that the conveyance had been obtained by fraud and undue means, a party is entitled to a new trial as a matter of right under the statute.

From the Vanderburgh Superior Court.

J. E. Iglehart and *E. Taylor*, for appellant.

D. B. Kumler, *A. Gilchrist*, *C. A. DeBruler* and *G. F. Denby*, for appellees.

NIBLACK, C. J.—On the 4th day of September, 1884, Mrs. Eliza McKittrick, of the city of Evansville, executed a deed conveying certain real estate in the counties of Vanderburgh and Ripley, respectively, and all of the personal property owned by her, to William Glenn and John H. Ebersole, of the city of Cincinnati, in trust for certain alleged and specified purposes.

This was an action by Mrs. McKittrick against Glenn and Ebersole to set aside that deed, upon the ground that, owing to mental infirmities resulting from advanced age and other causes, and to undue influences exercised upon her, she was wrongfully and improperly induced to execute it.

Other persons named as beneficiaries under the deed were also made parties defendants.

Glenn and Ebersole answered separately, forming issues upon the complaint. They also filed a cross-complaint, averring that they were the owners of the real estate described in the deed of conveyance, in trust and for the uses and purposes therein described; that the plaintiff had set up an adverse claim to such real estate, thereby casting a cloud upon their title. Wherefore they demanded that their title might be quieted.

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To this cross-complaint there was an answer in general denial. There was a finding and judgment for the defendants; also, in favor of Glenn and Ebersole upon their cross-complaint.

Mrs. McKittrick thereupon moved the court for a new trial as of right, under the provisions of section 1064, R. S. 1881, but the court, construing that section as not applicable to a case like this, refused to grant the motion.

It has often been held that in an ordinary suit to set aside a conveyance as fraudulent, for the purpose of subjecting the lands attempted to be conveyed by it to the claims of creditors, a party is not entitled to a new trial as of right under the section of the statute in question; but this is not a proceeding of that character, its object being to revest the title in lands in one from whom a conveyance had been obtained by fraud and undue means. In a case of this latter kind, a party is of right entitled to a new trial. *Warburton v. Crouch*, 108 Ind. 83.

The motion of Mrs. McKittrick ought, consequently, to have been sustained.

The judgment is reversed, at the costs of Glenn and Ebersole, and the cause is remanded for further proceedings.

Filed Oct. 23, 1888.

Shafer *et al.* v. Archbold *et al.*

No. 13,329.

SHAFFER ET AL. v. ARCHBOLD ET AL.

MECHANIC'S LIEN.—*Notice to Owner.*—It is essential, in cases governed by the statute concerning mechanics' liens, that the owner of the property against which a lien for materials furnished is sought to be taken shall have notice.

From the Adams Circuit Court.

D. D. Heller and *P. G. Hooper*, for appellants.

ELLIOTT, J.—The appellants seek to enforce a lien against real estate owned by Angeline M. Archbold, for materials furnished by them to the contractor who erected a house thereon.

It is stated in the special finding that the appellants "notified James T. Archbold that they were furnishing materials for said house for said William P. Moon, contractor," but it is not stated that they notified Angeline M. Archbold, the owner of the property. The statute requires that notice shall be given to the owner. R. S. 1881, section 5295. It is essential, in cases governed by the statute, that the owner shall receive notice. Phillips Mech. Liens, section 345. A material fact is therefore absent, and the conclusions of law are correct.

It is argued on the part of the appellants that their motion for a new trial should be sustained, for the reason that on the question whether James T. Archbold was the agent of Angeline M. Archbold, the finding is contrary to the evidence.

James T. Archbold was the only witness who testified in behalf of the appellants on this question, and he said that "I made the contract with Moon; I paid for it; I was allowed by the court \$1,000 for keeping Mary E. Troxell; some of that went into the house; I think about \$170 of my wife's money is in the house; I had no contract to act as

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her agent; I never had any talk with her about acting as her agent; I built the house because I wanted her to have it."

We can not say, in view of the well settled rule upon the subject, that the finding of the trial court is contrary to the evidence. It is inferable from the evidence that James T. Archbold had no authority to act for Angeline M. Archbold, and that he acted only for himself; at all events, the trial court was not bound to infer that he was her agent.

Judgment affirmed.

Filed Oct. 9, 1888.



116	30
126	234
116	30
126	581
116	30
126	186

No. 13,336.

GODFREY v. THE OHIO AND MISSISSIPPI RAILWAY COMPANY.

RAILROAD.—*Railroad Company not Liable for Mistake or Negligence of Receiver.*

—In the absence of a statute imposing liability, a railway company is not answerable for injuries resulting from the mistakes or negligence of a receiver or his agents while operating the road.

SAME.—*Tickets Issued by Receiver.—Company not Bound to Honor and Redeem.*

—In the absence of an express agreement to do so, a railway company is not bound to honor or redeem tickets issued by a receiver while he was operating the road.

SAME.—*Carrier of Passengers.—Ticket Entitling Passenger to Travel in Reverse Direction.—Collection of Fare.*—Where a passenger deliberately enters upon a railroad train, with knowledge that his ticket entitles him to be carried in the reverse direction from that in which he proposes to go, and with ample opportunity to procure another, the conductor may refuse to honor such ticket, and has the right to collect fare.

From the Jackson Circuit Court.

W. K. Marshall and A. P. Charles, for appellant.

J. B. Brown and R. Hill, for appellee.

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MITCHELL, J.—Godfrey sued the railroad company to recover damages alleged to have been suffered by him in being wrongfully ejected by the company's servants from one of its passenger trains upon which he had taken passage.

The complaint is in two paragraphs, both of which are substantially alike, except that it is averred in the second paragraph that the railroad was being operated by a receiver at the time the plaintiff purchased the ticket upon which he claimed the right to be carried, and that although the railroad company was operating its road when the plaintiff presented the ticket and claimed the right to ride upon it, the company had bound itself to carry out all contracts made by the receiver while the road was under his control.

The court sustained a motion to strike out certain portions of the complaint, which set forth the particular facts and circumstances relating to the manner in which the plaintiff was put off the train.

It is only necessary to say, in respect to the ruling on this motion, that no error was committed. All the circumstances relevant to any injury sustained by the alleged wrong were admissible in evidence without being specially pleaded.

It appeared in evidence that, on November 28th, 1883, the plaintiff, intending to take passage from North Vernon to Charlestown, purchased a ticket at the North Vernon ticket office for the station last named. The agent, by mistake, delivered him a ticket which on its face purported to entitle the holder to one passage from "Charlestown to North Vernon." After taking his seat in the car the plaintiff discovered the mistake, and, instead of offering the ticket to the conductor, paid the fare without mentioning the mistake, and was safely carried to his destination. When the plaintiff purchased his ticket, and continuously thereafter until April 1st, 1884, the property and franchises of the railroad company were in the hands of a receiver, who operated the road under the order of the United States Circuit Court for the district of Indiana. On the date last above mentioned the company was put into

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possession of its property, and was authorized by the order of the court to take the management of its affairs, subject to such orders as the court might thereafter make, in the way of requiring the corporation to pay such claims or liabilities as the receiver may have incurred while in possession of the property. The order further required that all claims against the receiver should be presented to the court for adjudication within sixty days. The railway company executed its bond as required by the order of the court, binding itself to pay any and all debts or liabilities contracted by the receiver under the order of the court.

On the 8th day of April, 1884, after the corporation resumed the operation of its road, the plaintiff went on board one of the company's regular passenger trains at North Vernon, which was proceeding on its way thence to Charlestown. He presented the ticket purchased while the road was in the hands of the receiver in November before. The conductor refused to receive the ticket, and demanded that the plaintiff should pay the usual fare, remarking in the hearing of other passengers that he did not know but that the ticket had been used before, or that the plaintiff might have stolen it. The plaintiff refusing to pay fare, the train was stopped at the next station, and the plaintiff directed to get off, which he did without resistance, and without suffering any violence to his person.

There was other evidence, but the foregoing summary is all that is necessary to present the questions involved.

At the conclusion of the evidence, the court instructed the jury to return a verdict for the defendant. This was done and judgment given accordingly. The propriety of the instruction of the court to the jury is the only question involved.

The instruction was very clearly right, upon two grounds, at least: (1) There was no evidence tending to show any mistake or negligence on the part of the railway company in the sale of the ticket. The plaintiff purchased the ticket, on

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which he insisted upon being carried, of the receiver, more than four months before he attempted to use it. The mistake in delivering the wrong ticket was the mistake or negligence of the agent of the receiver. The railway company could not be held responsible for injuries resulting from the omissions or mistakes of those who had possession and control of its property without its consent and in opposition to its will. It is settled beyond question, that a railroad company, in the absence of a statute imposing liability, is not answerable for injuries resulting from the mistakes or negligence of a receiver or his agents while operating the road. *Ohio, etc., R. R. Co. v. Davis*, 23 Ind. 553 (85 Am. Dec. 477); *Bell v. Indianapolis, etc., R. R. Co.*, 53 Ind. 57; *State v. Wabash R. W. Co.*, 115 Ind. 466; High Receivers, section 396.

It is true the ticket, in a sense, was evidence of a contract, at least so far as to indicate that the holder thereof had paid his fare from Charlestown to North Vernon, but it was a contract made by the plaintiff with the receiver, and, in the absence of an express agreement to do so, the railway company was under no obligation to redeem tickets issued by the receiver while he was operating the road. The bond executed by the company to the receiver was to indemnify the latter against all debts and liabilities incurred by him, but these were plainly such debts and liabilities as should be presented to the court within sixty days, and which the court should allow and order paid.

(2) Over and above the considerations already mentioned, it is quite clear that the plaintiff had no right of action, and that the jury were properly directed to return a verdict for the defendant.

As has been seen, the plaintiff purchased the ticket upon which he insisted he was entitled to ride, and which had been delivered to him by mistake, more than four months before he presented it for use. He discovered the mistake within

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a few minutes after receiving the ticket, and taking his seat on the car.

It is quite probable, if the plaintiff, without having had ample opportunity to correct the mistake after discovering it, had offered the ticket on the first trip, and had been refused passage, he would have been entitled to recover for any injury, in case he had been ejected after having done all he reasonably could to rectify the mistake. The case would then have fallen within the principles declared in *Lake Erie, etc., R. W. Co. v. Fix*, 88 Ind. 381, and cases of that class. But, having retained the ticket, with full knowledge of its purport, without disclosing the mistake to any one connected with the management of the road, the plaintiff must be regarded as having ratified the contract according to its terms.

Under section 2906, R. S. 1881, the plaintiff had the right to return the unused ticket and receive the money paid for it; or he had the option to retain it for what it purported to be, viz., a contract entitling him to be carried without further payment of fare from "Charlestown to North Vernon."

A person may not deliberately enter upon a railroad train, with knowledge that his ticket on its face entitles him to be carried in the reverse direction from that in which he proposes to go, and, with ample opportunity to procure another, insist upon being carried without paying fare. Railroad companies have the undoubted right to make reasonable regulations for the conduct of their business. It is certainly a reasonable requirement that a passenger, having the opportunity, should purchase his ticket to the place of his destination, and not in the opposite direction. To compel railroad companies to receive unused tickets, without regard to the direction which the holder wished to go, would introduce inextricable confusion into their business, and be of no benefit to any person possessed of sufficient intelligence to go upon a train. *Keeley v. Boston, etc., R. R. Co.*, 67 Maine, 163 (6 Cent. L. J. 382); *Bradshaw v. South Boston R. R. Co.*, 135

 Penrose *et al.* v. McKinzie.

Mass. 407 (16 Am. & Eng. R. R. Cases, 386); *Wakefield v. South Boston R. R. Co.*, 117 Mass. 544.

The conclusion already arrived at renders it unimportant that we consider other questions discussed.

The judgment is affirmed, with costs.

Filed Oct. 9, 1888.

No. 13,457.

PENROSE ET AL. v. MCKINZIE.

JURISDICTION.—*Justice of the Peace.*—*Judgment.*—The jurisdiction of a justice of the peace in civil actions is a limited one, and in all jurisdictional matters the requirements of the statute must be substantially complied with, or his judgments will be void.

SAME.—*Summons.*—*Service Upon Non-Resident.*—*When Justice's Judgment Void.*—Where, in an action before a justice of the peace, the defendant resides in another State and in that State endorses upon a summons—not issued or directed to any officer, but delivered to the plaintiff's attorney by the justice—his acknowledgment of service and a waiver of jurisdiction, and the summons, so endorsed, is returned by the plaintiff's attorney, whereupon a judgment is rendered against the defendant by default, such judgment is void, and may be so declared in a direct proceeding for that purpose. Sections 1431 and 1450, R. S. 1881, considered.

From the Montgomery Circuit Court.

J. H. Burford, for appellants.

J. Wright and *J. M. Seller*, for appellee.

Howk, J.—In this case the only error complained of here by appellants, the defendants below, is the decision of the

116	35
136	403
116	35
140	162
116	35
146	159
116	35
159	591
116	35
180	215

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court below in overruling their demurrer to appellee's complaint.

In his complaint, appellee, McKinzie, alleged that, on the 18th day of September, 1885, he instituted certain proceedings in attachment against one Orren J. Stoddard, who was a non-resident of the State of Indiana, in the Montgomery Circuit Court; that, on September 23d, 1885, appellee caused an order of attachment to be issued in said cause, and, on September 24th, 1885, the sheriff of Montgomery county levied such writ on and attached certain real estate, particularly described, in the county aforesaid; that, on November 20th, 1885, appellee recovered judgment in said cause against said Orren J. Stoddard for \$1,016.66, and a judgment, also, in his attachment proceedings, for the sale of said attached real estate; that, on January 9th, 1886, said attached real estate was sold at sheriff's sale, under the aforesaid judgment for the sale thereof, and appellee became the purchaser of such real estate at such sale thereof, and was then the owner of such real estate by virtue of his said purchase.

Appellee further averred that appellant Emlin G. Penrose filed a proper affidavit entitling him to have execution, and claimed to have purchased the same real estate theretofore described, on the 2d day of January, 1886, at a sheriff's sale upon said execution issued to the sheriff of Montgomery county, on a pretended judgment which said Penrose claimed to have obtained against said Orren J. Stoddard, on April 27th, 1878, before one Byron R. Russell, a justice of the peace of Union township, in said county, a transcript of which so-called judgment was filed in the clerk's office of said Montgomery county, on the 30th day of April, 1878, setting out a copy of such so-called judgment. And appellee alleged that appellant Penrose had received from defendant Harper, as sheriff of such county, a certificate of his purchase of such real estate upon such so-called judgment; and appellee averred that such so-called judgment was null and void, for the following reasons, namely:

1. Because the justice of the peace, before whom said cause was tried, had no jurisdiction of the subject-matter.

2. Because such justice had no jurisdiction of the person of said Orren J. Stoddard.

3. Because no valid or legal process or summons was ever served upon the defendant.

4. Because the pretended summons was void, having been issued to be served upon a person who resided outside of the township where the justice resided and held his office.

5. Because the pretended summons was not directed to any constable of said township.

6. Because the pretended summons was not delivered to any deputy constable of said township.

7. Because the pretended summons was not delivered to a special constable.

8. Because no summons was ever read to said Orren J. Stoddard.

9. Because no copy of said summons was left at the last or usual place of residence of said Orren J. Stoddard.

10. Because said suit was not commenced by a *capias ad respondendum*, nor by proceedings in attachment, against said Orren J. Stoddard.

11. Because, at the time of the filing said complaint before said Esquire Russell, and at the time of issuing said summons and of the acknowledgment of the endorsement on said summons, and on the day said Stoddard was defaulted, the said Stoddard was a non-resident of the State of Indiana, and was a resident of the State of Iowa.

Wherefore appellee asked that the so-called judgment of said justice of the peace might be declared void, and that Sheriff Harper, and his successors in office, might be perpetually enjoined from executing to appellant Penrose, or his assigns, a deed to said real estate under such so-called judgment, and for other proper relief.

Appellants' joint demurrer to appellee's complaint, upon the ground that it did not state facts sufficient to constitute a

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cause of action, was overruled by the court. They excepted to this ruling, and refused to plead further, and thereupon the court rendered its judgment and decree against them, in favor of appellee, in accordance with the prayer of his complaint.

Did the court below err in overruling the demurrer to the complaint for the alleged insufficiency of the facts therein to constitute a cause of action? This is the only question we are required to consider and decide in this case. We have heretofore given a full summary of the facts averred by appellee in his complaint herein, except such facts as were shown by the so-called judgment itself, which constituted a part of such complaint.

It appeared from such so-called judgment that, on April 17th, 1878, Emlin G. Penrose, by his attorney, filed his complaint against said Orren J. Stoddard, before Byron R. Russell, J. P., etc., upon a foreign judgment which said Penrose recovered of said Stoddard, on April 10th, 1878, by the consideration of a justice of the peace of Tama township and county, in the State of Iowa. Upon the filing of the complaint, Esquire Russell issued a summons for defendant Stoddard, returnable April 27th, 1878, and delivered the same to Penrose's attorney. Afterwards, on April 22d, 1878, said summons was returned by said attorney, endorsed as follows, to wit:

"I hereby acknowledge service of the within notice, waive jurisdiction of the court, and give consent to time and place of service, expressly waiving all informality. Done at Tama City, Iowa, this 19th day of April, 1878.

(Signed) "O. J. STODDARD."

The so-called judgment was in the words and figures following, to wit:

"April 27th, 1878, ten o'clock A. M. Plaintiff appeared by his attorney, and on motion defendant was three times called and came not, but wholly made default. It appearing by the return of summons that defendant was properly

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served with process, trial was had, plaintiff proved his complaint, and the court being fully advised, it is therefore found, considered and adjudged," etc.

We are of opinion that the court below did not err in overruling appellants' demurrer to the complaint herein. It will be observed that the complaint proceeds upon the theory that the so-called judgment rendered by Esquire Russell is absolutely void on its face; that such judgment, although void, is apparently a lien upon the real estate described in such complaint, and that appellee is entitled, therefore, as the owner of such real estate, to the decree of a court of competent jurisdiction annulling and avoiding such justice's judgment. This is not a collateral attack upon the justice's judgment, but it is a direct attack upon such judgment, alleging it to be null and void, and asking that it may be so declared. *Brickley v. Heilbruner*, 7 Ind. 488; *Grass v. Hess*, 37 Ind. 193; *Johnson v. Ramsay*, 91 Ind. 189.

Under the statutes of this State, the jurisdiction of a justice of the peace in civil actions is a limited jurisdiction, and the requirements of the statutes, in all jurisdictional matters, must be substantially complied with by the justice, or his judgments will be void.

In section 1450, R. S. 1881, in force since May 6th, 1853, it is provided that "Suits may be instituted before justices by agreement or process; and the delivery of the process to the officer authorized to serve the same, if by process, and the entry of the fact upon the docket, if by agreement, shall be deemed such commencement; and it shall be the duty of such officer to note on such process the date when it came to his hands."

The so-called judgment, described in the complaint herein, affirmatively shows that the suit in which such judgment was apparently rendered, never was instituted before Justice Russell in either of the modes authorized by the statute. While the judgment recites that the justice issued a summons for the defendant in the suit, it is also shown thereby that such sum-

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mons was delivered by the justice to the plaintiff's attorney, and not to any officer "authorized to serve the same." It appears also from the copy of such judgment, that the suit wherein it purports to have been rendered was not instituted "by agreement," because it fails to show "the entry of the fact upon the docket," which, the statute says, "shall be deemed such commencement," if the suit be instituted by agreement.

But if it were conceded that the suit in which such judgment was rendered was duly and legally commenced by appellant Penrose before Justice Russell, it is certain, we think, that the judgment affirmatively shows on its face that, at the time of its rendition, the justice had no jurisdiction whatever of the person of Orren J. Stoddard, the defendant in such suit. The judgment purports to have been rendered upon default. Such a judgment is absolutely void, if it appear on the face thereof that, at the time of its rendition, the justice of the peace had not acquired, in some mode provided by law, jurisdiction of the person of the defendant.

In this State two modes are provided by law, and only two, whereby a justice of the peace may acquire jurisdiction of the person of a defendant in an ordinary civil action, namely: 1. The service of process, issued for the defendant by the justice, by an "officer authorized to serve the same;" and, 2. "By agreement" of the defendant, in person or by attorney, before the justice and "the entry of the fact upon the docket."

The so-called judgment rendered by Justice Russell in the case of *Penrose v. Stoddard*, affirmatively shows that, at the time of the rendition thereof, such justice had not acquired jurisdiction of the person of defendant Stoddard in either of the modes provided by our statutes, and, therefore, it must be held, we think, that such judgment was and is void on its face.

Under the averments of appellee's complaint, admitted to be true by appellants' demurrer thereto, the so-called sum-

mons issued by Justice Russell for defendant, was not a summons or process in any legal sense. On the face of the judgment it appeared that such so-called summons was not issued or directed to, nor placed in the hands of, any officer authorized by law to serve the same, but was delivered to and returned by the attorney of Penrose, the plaintiff in such suit. Territorially, the jurisdiction of Justice Russell in such a suit as the one wherein he issued the so-called summons for defendant Orren J. Stoddard, was limited to Union township, in Montgomery county, Indiana. Section 1431, R. S. 1881. But it appeared on the face of such justice's judgment that the so-called summons was not served on defendant Stoddard in Union township, or in Montgomery county, or even in the State of Indiana, and that the only service of such summons or notice, as shown by the return endorsed thereon, was made at Tama City, in the State of Iowa. We are of opinion that this service of such summons or notice was not authorized by any law of this State, and did not give Justice Russell jurisdiction of the person of defendant Orren J. Stoddard. The so-called judgment of such justice, described in appellee's complaint herein, is absolutely void on its face. *McCormack v. First Nat'l Bank, etc.*, 53 Ind. 466; *State, ex rel., v. Ennis*, 74 Ind. 17; *Paulus v. Latta*, 93 Ind. 34.

The demurrer to the complaint was correctly overruled.

The judgment is affirmed, with costs.

Filed Oct. 23, 1888.

Dennis v. The Louisville, New Albany and Chicago Railway Company.

No. 13,415.

DENNIS v. THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

RAILROAD.—Animals.—Escape from Enclosure.—Contributory Negligence.—In an action by a land-owner against a railroad company for the value of a horse which escaped from his enclosure and was killed by the defendant's train, the plaintiff is not guilty of contributory negligence if his fences were ordinarily and reasonably secure.

SAME.—No Presumption that Animal will Leave Track.—There is no presumption that a horse or other animal will step from the railroad track in time to avoid injury.

SAME.—Trespassing Animal.—Failure of Engineer to See.—Where an animal enters upon a railroad track at a point where the road is securely fenced, and is killed by a passing train, the railroad company, if liable at all, is not liable in the absence of proof that the engineer or fireman saw the animal.

SAME.—Failure to Heed Signs and Gestures.—Negligence.—Where there is no proof that the engineer saw the animal upon the track, it can not be said as matter of law that he was guilty of negligence because he failed to heed gestures and motions made by men along the way.

From the Jackson Circuit Court.

S. B. Voyles and *H. Morris*, for appellant.

D. M. Alsbaugh and *J. C. Lawler*, for appellee.

ELLIOTT, J.—The appellant owned a mare which he kept in a securely fenced field adjoining the track of the appellee. The mare escaped from the field and entered upon the appellee's track at a point where it was securely fenced. The appellant endeavored without success to catch her, and she was struck and killed by one of the appellee's trains. The mare ran in front of the approaching train and was overtaken by it in a cattle-guard. The engineer and fireman of the appellee "might have seen the mare from the engine at the distance of one quarter of a mile before the engine struck the mare, and when the train first came to a point where the mare could be seen by the engineer, it was running at the rate of

116	49
117	864
120	375
116	42
124	611
116	42
118	397

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thirty-five or forty miles an hour." Signs and motions were made to the engineer and fireman by men in pursuit of the mare, which were seen by the fireman, but no attention was paid to them, nor was the bell rung or whistle sounded. About two hundred yards from the cattle-guard the engineer shut off the steam and applied the brakes, checked the speed of the train, and brought it to a full stop after part of the train had passed the cattle-guard. The engineer might, by the exercise of ordinary prudence and care, have seen the mare and stopped the train in time to prevent the accident, but he did not wilfully run upon the mare.

The case comes before us upon a special finding, and from that finding we have extracted the material facts. It is now a firmly settled rule of practice, that if a finding is silent upon a material point, on that point it is against the party who has the burden. As the appellant had the burden, silence upon a material point is consequently fatal to him.

We agree with counsel that the finding shows that there was no contributory negligence. A man who places a horse in an enclosure securely fenced, is not to be charged with contributory negligence because the horse leaps the fence and escapes, unless it appears that the horse was one that ordinary fences would not confine. A land-owner is not guilty of contributory negligence if he maintains fences that are ordinarily and reasonably secure. Certainly, a railroad company is not bound to make a fence that will keep every animal from its track, and what is not required of the railroad company can not, in justice, be required of the land-owner. *Toledo, etc., R. W. Co. v. Milligan*, 52 Ind. 505.

We do not concur with appellee's counsel that the same rule applies to animals seen upon the track that governs where adult persons are seen upon it by the engineer. There can be no presumption that a horse or a cow will step from the track in time to avoid injury. For this reason the rule declared in *Chicago, etc., R. R. Co. v. Hedges*, 105 Ind. 398, and similar cases, does not apply to such a case as this. We can

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not, therefore, yield to the contention of appellee's counsel upon this point.

We are, however, of the opinion that the judgment of the trial court must be sustained, for on one material point, at least, the finding is silent. The finding does not show that the mare was seen by the engineer or fireman. It is to be remembered that the train was rightfully moving along the track of which the appellee was the exclusive owner, that it was fenced as the law requires, and that the mare was wrongfully on it. The employees of the appellee were not under a duty to an owner to see animals wandering on a track securely protected, and here we are concerned only with their duty to the owners of wandering animals. Whether the appellee would have been liable had the engineer or fireman seen the mare and taken no measures to stop the train or frighten her from the track, we need not decide, for it does not appear that they saw the animal. We do not believe that where an animal wrongfully on the track is not seen, a railway company is liable, although one of its engines strikes and kills it. This is so, for the reason that the company owes no such duty to the owner of domestic animals, and where there is no duty there can be no negligence.

We can not say, as matter of law, that because gestures and motions made by men along the track were unheeded there was negligence. If this fact had been supplemented by a finding that the animal was seen on the track, then it may be that a different rule should be applied. *Palmer v. Chicago, etc., R. R. Co.*, 112 Ind. 250. But where nothing is seen on the track, engineers are not necessarily guilty of negligence in such a case as this for not attending to gestures made by persons near the track, unless the gestures are clearly such as to give fair and full warning that injury will result if the train is not halted. To hold otherwise would place engineers in a position that would greatly and unjustly embarrass them in the performance of their duties, and subject them to unjust annoyance. In this case the meaning and

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character of the signs and gestures are not stated, and it is very clear that, whatever may be the rule in other cases, there is no ground for holding that the failure to heed signs and gestures constituted actionable negligence.

Judgment affirmed.

Filed Oct. 11, 1888.

No. 13,539.

THE STATE v. PATTERSON.

CRIMINAL LAW.—Elections.—Voting More than Once.—Indictment.—Mistake in Charging Time of Commission of Offence.—An indictment returned November 3d, 1886, charged that the defendant, on November 4th, 1886, the same being the day upon which the general election was held in Indiana for Governor, etc., as required by law, voted more than once, by intentionally handing to the inspector two ballots at the same time and place, which ballots were placed in the ballot-box by the inspector.

Held, that judicial notice will be taken that there was no election on November 4th, 1886, but that there was an election for Governor on November 4th, 1884, less than two years prior to the return of the indictment.

Held, also, that the indictment shows that it relates to a past transaction, and that as the averments are repugnant and time not of the essence of the offence, the imperfection in stating the time is not cause for quashing the indictment.

Held, also, that the indictment sufficiently charges a violation of the statute against voting more than once.

From the Hancock Circuit Court.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

I. P. Poulson and *W. F. McBane*, for appellee.

ZOLLARS, J.—Appellant is charged in the indictment with having voted more than once at the same election.

116	45
136	150
116	45
146	179
146	613
116	45
148	52
116	45
e165	450

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The charge as to the time is as follows :

"That said Jefferson C. Patterson, at said county, on the 4th day of November, 1886, the same being the day upon which the general election was then and there being held in said State of Indiana for the election of Governor, Lieutenant-Governor and the various other officers of said State, Representatives to the General Assembly of said State, Representatives to the Congress of the United States from said State, and also the various officers in the different counties in said State, as was then and there required and authorized by the law of said State, * * did," etc.

We have no means of knowing upon what grounds the court below quashed the indictment, except as indicated by the brief of counsel for the State.

As therein indicated, the ground was that the time at which the offence is charged to have been committed is an impossible date.

The indictment was returned on the 3d day of November, 1886. A part of the charge as to the time of the commission of the offence fixes it on the 4th day of November, 1886. If we are to look to that part of the charge alone, the case falls within the ruling in the case of *Murphy v. State*, 106 Ind. 96, where it was held that the statement of an impossible date is fatal to an indictment.

It is the duty of the courts, however, to consider the indictment as a whole in ascertaining the time charged as well as in construing other charges therein. This is especially so under our legislation, and more particularly under our more recent legislation.

The statute provides that an indictment is sufficient if it can be understood therefrom: "*Fifth*. That the offence charged is stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case." R. S. 1881, section 1755.

It is further provided that no indictment shall be deemed invalid, nor shall the same be set aside or quashed, nor shall

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the trial, judgment, or other proceeding be stayed, arrested, or in any manner affected, for any of the following defects :

"*Sixth.* For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged. * * *

"*Eighth.* For omitting to state the time at which the offence was committed in any case in which time is not the essence of the offence ; nor for stating the time imperfectly, unless time is of the essence of the offence. * * *

"*Tenth.* For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." R. S. 1881, section 1756.

This court has held that, under the above statutes, an indictment will not be bad because it contains no statement of the time at which the crime charged was committed, nor because the time may be stated imperfectly, unless time is of the essence of the offence. *State v. Sammons*, 95 Ind. 22.

The case before us, we think, falls within the ruling in the case last above cited, and so within the above statutes. It is charged that the offence was committed on the 4th day of November, 1886, as we have seen, which was one day after the return of the indictment. But immediately following that statement is this : " The same being the day upon which the general election was then and there being held in said State, * * for the election of Governor, * * * as was then and there required and authorized by law."

This portion of the indictment, as well as other portions of it, has relation to a past transaction, and shows that the offence charged had been committed before the return of the indictment. In fixing the time and occasion, it is charged that the alleged illegal voting was upon the day of, and at, a general election fixed by law, and held for the election of a Governor. That charge necessarily fixes the time in the past.

The courts take judicial notice that the election in 1886 was on the 2d day of November, and could not take place

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on the 4th day of that month. They also take judicial notice that there was an election for Governor on the 4th day of November, 1884, which was less than two years prior to the return of the indictment.

If the statement "on the 4th day of November, 1886," had been omitted from the indictment, we should then have an indictment charging that appellee voted illegally at a general election fixed by law, and held for the election of Governor. Such an indictment, we think, would clearly have been good under the above statutes, because, as before said, no time need be stated, and the courts take judicial notice that there was such an election within the time fixed by the statute of limitations.

The statement that the illegal voting was at an election for Governor, fixes the time in the past. The statement of the time as being on the 4th day of November, 1886, fixes it in the future. These statements are repugnant. But, as we have seen, the statute provides that no indictment shall be deemed invalid, nor shall the same be set aside or quashed, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected, for any surplusage or repugnant allegations, when there is sufficient matter alleged to indicate the crime and person charged. *Myers v. State*, 101 Ind. 379; *State v. McDonald*, 106 Ind. 233. The indictment shows that the crime charged is illegal voting at an election for Governor.

The tense of the verbs in the indictment, and the several charges therein, taken as a whole, make it clearly appear that the offence charged was committed before the return of the indictment. On account of the repugnant averments, it may well be held that the time is imperfectly stated. Such an imperfection, as we have seen, is not a cause for quashing the indictment. It is a "defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

Looking to the indictment as a whole, it may reasonably be

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said that "the offence charged is stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case."

A conviction upon the indictment would be a bar to another prosecution, because there was no election for Governor in 1886, and because the only election for Governor within the statute of limitations was in 1884. Indeed, since the adoption of the Constitution of 1851, up to the present time, there has been but one election for Governor in November, and that was on the 4th day of November, 1884.

Prior to 1884, and subsequent to the adoption of the Constitution of 1851, the elections for Governor were held in October. The constitutional amendment adopted in 1881 requires the election for Governor, as for other State and county officers, to be held in the month of November. The election held on the 4th day of November, 1884, was the first, and, so far, the only election for Governor under that amendment.

We have examined the indictment with reference to the one question discussed by counsel, and so far as that is concerned hold the indictment to be sufficient.

Judgment reversed, at appellee's costs.

Filed Jan. 25, 1887.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—The argument of appellee's counsel has received careful attention, but we are not able to find any valid reason for departing from our former opinion.

Courts take judicial notice of the time of holding elections for Governor, and they take notice, therefore, that the last election for that office, prior to the return of the indictment against the appellee, was held in November, 1884. As this fact is judicially noticed, the designation of the date of the election in the indictment as November 4th, 1886, is a mistake apparent on the face of the pleading, and we must disregard the erroneous designation of the date and act

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upon what we judicially know was the actual date, and the date which the grand jurors meant to state in the indictment. The mistake is evident upon an inspection of the pleading, and, as said in the former opinion, when the whole indictment is considered, it is obvious that the most that can be justly affirmed is that the time is imperfectly stated. *State v. Little*, 6 Blackf. 267.

The indictment charges that the appellee "did then and there unlawfully, wilfully, purposely and feloniously vote more than once upon said day at said election for the officers aforesaid, by then and there unlawfully, wilfully, purposely and feloniously handing to Alexander K. Branham, the inspector of said election at the precinct aforesaid, two separate and distinct ballots at the same time and place, then and thereby intending to and indicating his vote for the officers aforesaid, which said ballots and votes were then and there accepted and placed in the ballot-box by said inspector."

The indictment shows that two votes were feloniously cast and were accepted, and this was a palpable violation of the law.

The law intends that a voter shall cast one vote, and no more. If he corruptly and purposely casts two ballots, he illegally votes twice. It is immaterial how he executes his corrupt purpose; if he does vote twice, he is guilty of a crime. The question is not as to the means he used to effect his corrupt purpose, but whether he did effect it, for, if he did effect it, he illegally voted twice, and should be punished.

The question here is not one of evidence, but of pleading, and the motion to quash concedes the truth of the facts alleged, as does a demurrer in a civil action; therefore the only thing for us to do is to apply the law to the admitted facts. This we do by holding that, as the appellee corruptly intended to vote twice, and as he accomplished this purpose by feloniously depositing two ballots, he violated the law, and must pay the penalty.

Petition overruled.

Filed Oct. 13, 1888.

 Waterman v. The State.

No. 14,596.

WATERMAN v. THE STATE.

CRIMINAL LAW.—*Return of Indictment.*—*Amendment of Record.*—*Plea in Abatement.*—Where the record does not show the return of an indictment into court it may be corrected by an entry *nunc pro tunc*, and a plea in abatement previously filed may then be overruled, the correction relating back to the time and being evidence of the return of the indictment.

SAME.—*Misconduct of Bailiff.*—*Setting Aside Verdict.*—Misconduct on the part of a bailiff or other person connected with a trial, which is known to and acquiesced in without objection by a party or his counsel, can not afterwards be made available as a ground for setting aside a verdict, even though it be of a character which would otherwise vitiate the verdict.

SAME.—*Embezzlement.*—*Ownership.*—*Consignee.*—A consignee has such a qualified ownership in the property consigned as will sustain a charge for the embezzlement of the property from the consignee as owner.

SAME.—*Requisition.*—*Jurisdiction.*—Where an accused is returned to this State, upon a requisition, to answer a charge of embezzling money, he may be tried upon an indictment charging the embezzlement of property.

From the Warren Circuit Court.

C. V. McAdams, for appellant.

L. T. Michener, Attorney General, *W. B. Reed*, Prosecuting Attorney, and *E. Stansbury*, for the State.

MITCHELL, J.—Waterman was tried and convicted upon an indictment which charged him with the crime of embezzlement. At the proper time, he pleaded in abatement that the record did not show that an indictment had been returned into court against him. After the plea was filed the record was amended so as to show that an indictment had been duly returned, and, upon the evidence of the record so amended, the court found the issue raised upon the plea against the defendant.

It is now contended that the court erred in admitting the amended record in evidence to defeat the plea, the argument being that the issue should have been determined upon the

116	51
194	13
116	51
133	313
116	51
152	231
116	51
164	235
116	51
167	234

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facts as they existed at the time the plea was filed. There is no merit in the point. It was not only competent for the court, but it was its duty, whenever the fact was brought to its attention that the clerk had omitted to make the proper entry showing the return of the indictment, to cause the same to be done by an entry *nunc pro tunc*, so that the record would conform to the facts as they actually occurred and existed. *State v. Pearce*, 14 Ind. 426; *Long v. State*, 56 Ind. 133; *Chamberlain v. City of Evansville*, 77 Ind. 542.

When the record was corrected, the correction related back to the time of the returning of the indictment. It did not bring any new facts into existence, but it became proper evidence of the facts as they existed before the filing of the plea.

It is insisted next, that the court erred in overruling the appellant's motion for a new trial on account of the alleged misconduct of the jury in permitting the presence of the bailiff in the jury-room during their deliberations.

All that appears in the record upon that subject is the affidavit of appellant's counsel, who deposes, in substance, that he was present in court during the deliberations of the jury, which continued for two hours; that he saw the bailiff during that time frequently go to the jury-room, when there was no signal for him, and enter and remain in the room from ten to fifteen minutes at a time while the jury were deliberating, and that the bailiff told the affiant after the verdict was returned that he was present and knew how the jury voted on several ballots.

The conduct of the bailiff was reprehensible in the highest degree, and we can not but believe that if appellant's counsel had promptly reported the facts to the court at the time he observed the misconduct of the bailiff, in going unbidden into the jury-room, the matter would have been set right at once.

Ordinarily, the unexplained presence of the bailiff in the jury-room during the deliberations of the jury is such mis-

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conduct as vitiates their verdict. *Rickard v. State*, 74 Ind. 275; *McClary v. State*, 75 Ind. 260; *Doles v. State*, 97 Ind. 555.

In the present case, however, the affidavit of the appellant's counsel discloses the fact that counsel saw the bailiff go into the jury-room without any invitation or signal from within, and that this was repeated again and again in his presence, without protest or objection, although the counsel was present in court at the time. In whatever light counsel may have regarded the conduct of the bailiff after an adverse verdict was returned, it does not seem to have impressed him as being of sufficient consequence at the time to justify mention to the court.

Misconduct on the part of any one connected with a trial, which is known to and acquiesced in without objection by the party or his counsel, even though it be of a character which might otherwise vitiate the verdict, can not afterwards be made available as a ground for setting aside a verdict. *Henning v. State*, 106 Ind. 386; *Coleman v. State*, 111 Ind. 563.

There is no substantial merit in the point which is based upon some remarks of the prosecuting attorney in his closing address to the jury. Whatever there may have been which went beyond the limits of fair inference to be drawn from the evidence upon which comment was being made, was fully eradicated by instruction and admonition to the jury and counsel, promptly given on the spot by the court.

The court instructed the jury, in substance, that it was not essential that the proof should show that the absolute and unqualified ownership of the property alleged to have been embezzled by the defendant was in the alleged owner; but that if the proof showed that the property was in the hands of such owner as consignee, and he was responsible to some one for it, that would be a sufficient ownership. An examination of section 1944, R. S. 1881, will make it plain that this instruction was not objectionable.

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A consignee has such a qualified ownership in the property consigned as will sustain a charge of larceny for the felonious taking of property from the consignee as owner. We have been cited to no authority which makes a distinction in that regard between larceny and embezzlement, and we can perceive no reason for making a distinction.

The record discloses the fact that the appellant was brought from the State of Michigan upon a requisition which stated that he was charged with embezzling divers sums of money, the property of Bruce & Ball. The appellant was afterwards indicted for embezzling money, and also, in another count of the same indictment, for embezzling property belonging to Bruce & Ball.

Subsequently the count charging the embezzlement of money was quashed. The point is now made that the court did not acquire jurisdiction to try the appellant except for the crime of embezzling money, as charged in the affidavit filed before the justice of the peace, upon which the requisition was obtained.

The charge in the indictment was substantially the same as the charge in the affidavit filed before the justice. The affidavit charged the crime of embezzlement in respect to money belonging to Bruce & Ball. The indictment charged the same thing, except that in one count it was charged that certain property of Bruce & Ball was embezzled, while in the other, although the same property was involved, it was laid as money.

This was simply charging the same offence in different ways, in order to meet the evidence as it might appear at the trial. There was no error.

Judgment affirmed, with costs.

Filed Oct. 10, 1888.

The State v. Briggs.

No. 14,149.

THE STATE v. BRIGGS.

INSURANCE.—Foreign Corporation.—Agent of.—Failure to Comply with Statute.—Misdemeanor.—Word "State" Includes District of Columbia.—Statute Construed.—The District of Columbia is a "State" within the meaning of section 3765, R. S. 1881, making it unlawful for the agent of "any insurance company incorporated by any other State than the State of Indiana" to transact business in this State without first complying with the requirements of such statute. *Daly v. National Life Ins. Co.*, 64 Ind. 1, distinguished.

From the Sullivan Circuit Court.

L. T. Michener, Attorney General, *S. W. Axtell*, Prosecuting Attorney, *W. C. Hultz*, *W. S. Maple* and *T. J. Wolfe*, for the State.

J. S. Bays, for appellee.

NIBLACK, C. J.—This was a prosecution under section 3771 for a violation of the provisions of section 3765, R. S. 1881, having relation to the business of insurance, and was based upon an affidavit and an information filed upon it.

The affidavit, as well as the information, charged that Fred Briggs, on or about the 1st day of October, 1886, at the county of Sullivan, in this State, did then and there transact certain business of insurance as an agent of a certain foreign insurance company incorporated by a State other than the State of Indiana, to wit, incorporated by and under the laws of the District of Columbia, and did then and there, as such agent, unlawfully take a certain risk, and issue a certain policy of insurance, in the name of said company, known as the Chesapeake Fire Insurance Company, to one John J. McKinney, in the sum of \$1,250, to secure him, the said McKinney, against loss by fire on a certain particularly described stock of goods, wares and merchandise situate in a building in said county of Sullivan, and did then and there receive of

The State v. Briggs.

and from him, the said McKinney, the sum of \$18.75 as the premium on said policy of insurance, he, the said Fred Briggs, not having, before the time of transacting such business of insurance, and before taking such risk and issuing such policy of insurance, obtained a certificate of authority from the auditor of state of the State of Indiana, and without having first filed such a certificate of authority and a certified copy of the statement on which it was obtained, in the office of the clerk of the Sullivan Circuit Court.

The defendant moved to quash the affidavit and information, upon the ground that the District of Columbia is not a State, and hence not a State other than the State of Indiana, within the meaning of section 3765, R. S. 1881, referred to, and his motion was sustained, whereby he was discharged.

So much of section 3765 as is material to this controversy is as follows:

“It shall not be lawful for any agent or agents of any insurance company incorporated by any other State than the State of Indiana, directly or indirectly, to take risks or transact any business of insurance in this State, without first producing a certificate of authority from the auditor of state; and, before obtaining such certificate, such agent or agents shall furnish the said auditor with a statement, under oath, of the president or the secretary of the company for which he or they may act, which statement shall show: *First*. The name and locality of the company. *Second*. The amount of its capital stock. *Third*. The amount of its capital stock paid up. *Fourth*. The assets of the company; * * * * * *Fourteenth*. The act of incorporation of such company.”

This statement, together with a written instrument authorizing such agent or agents to acknowledge the service of process for and on behalf of such company, is required to be filed in the office of the auditor of state, and the agent or agents receiving such a certificate shall file the same, together with a certified copy of the statement upon which it was obtained, in the office of the clerk of the circuit court of the

The State v. Briggs.

county in which it is proposed to establish an agency for the transaction of insurance business.

Section 3771 makes a violation of the provisions of the foregoing section, as well as other accompanying sections, a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court having jurisdiction of the offence.

The seventh subdivision of section 240, R. S. 1881, provides that "The word 'State,' applied to any one of the United States, shall include the District of Columbia and the several Territories; and the words 'United States' shall include the said District and Territories," and this rule of statutory construction has prevailed since the 6th day of May, 1853. 2 R. S. 1876, 316.

The District of Columbia is, consequently, a "State" within the meaning of section 3765, of which we have given a synopsis as above.

The case of *Daly v. National Life Ins. Co.*, 64 Ind. 1, is cited as holding a different doctrine, and hence as sustaining the decision of the circuit court. That case involved the question as to whether a statute enacted on the 17th day of June, 1852, was impliedly repealed by the later act of December 21st, 1865, as applicable to a contract made with an insurance company, and therefore the question for decision then before the court was not the same as in the present case. For that reason no inference can properly be drawn from that case which is decisive of the question now presented, or which can rightfully be construed as leading to the conclusion reached by the circuit court.

The judgment is reversed, with costs, and the cause is remanded for further proceedings.

Filed Oct. 24, 1888.

Hessian v. The State.

No. 14,401.

HESSIAN v. THE STATE.

BILL OF EXCEPTIONS.—Filing.—Record Must Show.—Practice.—Where time is given within which to file a bill of exceptions, the record must affirmatively show in some manner that it was filed within the time given, or it will not be considered on appeal as a part of the record.

From the Monroe Circuit Court.

R. W. Miers, E. Corr, J. H. Loudon and W. P. Rogers, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

ZOLLARS, J.—The ground urged by appellant for a reversal of the judgment, and that upon which the State asks for its affirmation, are each based upon a strict construction of the statutes, and neither goes to the merits of the case.

It is contended by appellant that the court erred in giving an oral instruction after having been requested to charge in writing.

On the other hand, it is contended by the attorney general that the record does not present the point relied upon by appellant, for the reasons that it can only be presented by a bill of exceptions, and that there is nothing in the record to show that a bill of exceptions was ever filed.

This contention on the part of the State can not be disregarded. The statute provides that when the bill of exceptions is filed it shall be a part of the record. R. S. 1881, section 629. The holdings have been, that, where time is given in which to file a bill of exceptions, the record must show affirmatively, in some manner, that it was filed within the time given by the court, or it can not be considered in this court as constituting a part of the record. *Loy v. Loy*, 90 Ind. 404.

116	58
128	368
116	58
132	557
116	58
134	7

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It has been held, however, that where, in the clerk's certificate to the transcript, made before the expiration of the time given within which to file the bill, there is a statement that the transcript is a transcript of all of the papers "*filed*" in the cause, or of all of the papers "*on file*," that will be regarded as sufficient evidence of the filing of the bill. *Hull v. Louth*, 109 Ind. 315 (336); *Armstrong v. Harshman*, 93 Ind. 216; *Oliver v. Pate*, 43 Ind. 132; *Porter v. Choen*, 60 Ind. 338 (346).

The case before us is not within the ruling in those cases. After noting the filing of a motion for a new trial by appellant, the record is as follows: "Which motion is overruled by the court, and the defendant at the time excepted, and sixty days are given defendant to file a bill of exceptions. Which bill of exceptions is in the words and figures following, to wit." Following that is set out what purports to be a bill of exceptions.

In his certificate to the transcript the clerk states that the transcript "contains true and complete copies of all the papers and entries in said cause." A bill of exceptions is not a paper in the cause unless filed as required by the statute, and it will readily be seen that there is nothing in the record to show that any bill was ever filed in this cause.

For this reason the judgment must be and is affirmed, with costs.

Filed June 26, 1888; petition for a rehearing overruled Oct. 10, 1888.

New York, Chicago & St. L. R'y Co. v. Grand Rapids & Indiana R. R. Co.

116	60
136	81
116	60
157	223

No. 13,360.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY.

RAILROAD.—Crossing.—Signals.—Contract.—Damages.—Where a railroad company, desiring to cross the road of another company, agrees to provide proper signals at the crossing and a watchman to operate the same, and the parties to the contract afterwards agree upon a code of signals to be given by the watchman and observed by the parties, the company first mentioned is liable to the other company for damages caused by running its engine into the latter company's train, which is proceeding over the crossing in obedience to a signal giving it the right thereto.

SAME.—Contributory Negligence.—Anticipation of Breach of Duty.—Until it appeared that there was a disregard of the signal by the defendant, the employees of the plaintiff were not guilty of negligence in failing to anticipate a breach of duty on the part of the defendant.

SAME.—Evidence.—In such case it is competent to prove by a qualified witness the difference in value between a car as it was after it was repaired and as it was before it was injured.

SAME.—Intoxication of Engineer.—In such case it is not error to admit evidence that the defendant's engineer had been drinking intoxicating liquor.

SAME.—Expert.—Opinion.—A competent expert may give an opinion as to the distance at which it is safe to stop before going upon a crossing.

VERDICT.—Interrogatories to Jury.—A general verdict will stand as against answers to interrogatories, unless some fact fatal to a recovery is stated in such answers.

From the Allen Superior Court.

R. C. Bell and *S. L. Morris*, for appellant.

A. A. Chapin and *W. S. O'Rourke*, for appellee.

ELLIOTT, J.—The complaint of the appellee sets forth a written agreement in which, among other things, the appellant promised to put in, at the place where it was agreed that its road should cross that of the appellee, "a semaphore, or such other signals or signal as may be now or hereafter be prescribed by law, and supply and keep and maintain good,

New York, Chicago & St. L. R'y Co. v. Grand Rapids & Indiana R R Co

sufficient and acceptable watchman to take charge of and operate the same forever."

It is averred that the contracting parties had agreed upon a code of signals to be used at the crossing, and that it was the duty of the watchman to operate the signal target and give the proper signals; that each of the parties had agreed to obey these signals; that the proper signal was given which gave the appellee the exclusive right to the crossing; that while moving a train upon said crossing in obedience to the proper signal, the appellant's engineer drove the engine of which he was in charge against the appellee's cars, and that the injury to the appellee's property was caused by the appellant's reckless and wilful negligence.

The contract between the parties must be construed with reference to the surrounding circumstances and the object the parties intended to accomplish. *Indiana, etc., R. R. Co. v. Adamson*, 114 Ind. 282.

It is obvious that what the parties intended was that the appellant should secure a way across the track of the appellee, and should provide means of making and keeping the crossing safe for the use of both parties. Whatever was reasonably necessary to carry into execution this object was implied, and it was, therefore, entirely competent for the parties to give effect to the contract by establishing a code of signals. As they did establish such a code under the contract, and the appellant failed or refused to obey it, there was a breach of contract, and hence a clear right of action. This right of action came into existence the moment the contract was violated and loss resulted. It is not material whether the breach was reckless or not; if there was a breach the appellant became a wrong-doer, and as such liable to an action.

Counsel for appellant argue that "There is no right of recovery on the contract, because there is nothing in it by which the appellant obligates itself to indemnify appellee against the acts of the target-man—no negligence is charged against the target-man; there is no agreement in it to pay for the

New York, Chicago & St. L. R'y Co. v. Grand Rapids & Indiana R. R. Co.

negligence of appellant's employees in disobeying the target-man's signals." This argument is entirely destitute of strength. The law awards damages where there is a breach of contract or of duty. It is not essential that parties should incorporate the law in their contract.

The answers to the special interrogatories addressed to the jury do not overthrow the general verdict. We agree with appellant's counsel that if the appellee had been guilty of negligence contributing to the injury no action would lie. *Gavett v. Manchester, etc., R. R. Co.*, 16 Gray, 501; *Kentucky Central R. R. Co. v. Dills*, 4 Bush, 593.

But while acquiescing in counsel's view of the law, we dissent from their construction of the answers to interrogatories. It may be true that the employees of the appellee could have seen appellant's locomotive in time to have stopped the appellee's train, but from this fact it can not be inferred that they were negligent. They were obeying the rightful signal, and they were not bound to anticipate a disobedience by the appellant. On the contrary, until it appeared that there was a disregard of the signal the employees of the appellee were not negligent in failing to anticipate a breach of duty on the part of the appellant.

The general verdict embraces the whole issue, and necessarily decides all material questions in favor of the appellee, and that decision must stand unless some one, at least, of the answers states a fact fatal to a recovery. It is essential that the facts shall be stated, for presumptions are made in favor of the general verdict, and not in favor of the answers to special interrogatories. *Fort Wayne, etc., R. W. Co. v. Beyerle*, 110 Ind. 100; *Rice v. City of Evansville*, 108 Ind. 7; *Redelsheimer v. Miller*, 107 Ind. 485.

There is no fact stated in any of the answers of the jury that overthrow the general verdict.

There was no error in admitting in evidence the contract between the parties respecting the crossing.

The court did not err in permitting the witness O'Rourke

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to state the approximate cost of taking up and repairing the car injured by the collision.

It was competent to prove by a qualified witness, as Sylvanus Bradley was, the difference in value between the car as it was after it was repaired, and as it was before it was injured.

A competent expert may give an opinion as to the distance at which it is safe to stop before going upon a crossing.

It was not error to permit the appellee to give evidence tending to show that appellant's engineer had been drinking intoxicating liquor.

We have examined the instructions given and refused, and we find no error in any of the rulings upon them.

We can not disturb the verdict on the evidence. It is, in truth, well supported.

Judgment affirmed.

ZOLLARS, J., did not take any part in the decision of this case.

Filed Oct. 12, 1888.

No. 12,822.

HUDSON ET AL. v. BUNCH ET AL.

DRAINAGE.—*Assessment.*—*Lands in Another County.*—*Jurisdiction.*—The court of the county in which the petitioner for drainage resides and where the proceeding is commenced, has jurisdiction and authority to establish a ditch extending into another county, and to make assessments against lands situate in such other county.

SAME.—*Report of Commissioners.*—*Remonstrance.*—*Practice.*—In a remonstrance against the report of drainage commissioners it is not sufficient to use the general terms of the statute that "the report is not according

116	63
136	458

116	63
170	471
170	612
170	613

116	63
1171	463

Hudson et al. v. Bunch et al.

to law," and such a remonstrance presents no issue for trial. The particulars in which it is claimed that the report is in that respect defective must be specified.

From the St. Joseph Circuit Court.

J. D. McLaren, E. C. Martindale, S. J. Hays and W. G. George, for appellants.

L. Hubbard and A. Anderson, for appellees.

Howe, J.—On the 7th day of February, 1883, appellee Bunch and eleven other persons filed in the office of the clerk of the court below their petition, duly verified, praying for the location and construction of a certain ditch or drain. It was alleged by the petitioners that such ditch or drain would benefit their lands, but could not be constructed "in the best and cheapest manner without affecting other lands" in St. Joseph and Marshall counties. Such petition was so filed under and pursuant to, and in apparent conformity with, the provisions of section 4274, R. S. 1881, in force at the time; and it was averred therein, among other things, that the drainage prayed for would promote the public health, would benefit three public highways therein described, and would be of public utility. Such proceedings were afterwards had on such petition as that, on the 15th day of January, 1885, final judgment was rendered by the court below for the construction of the aforesaid ditch or drain as therein prayed for, and for the confirmation of the assessments of benefits theretofore made to pay the costs of such construction.

On the 12th day of January, 1886, the remonstrants below and appellants here filed in this court a transcript of the record of this cause, with a large number of alleged errors endorsed thereon, and an elaborate and able brief discussing the various questions presented by such errors. Thereafter it was shown to this court by appellees, that, upon their motion, and due notice thereof to appellants, the court below had caused the record of this cause to be amended and corrected in some important particulars; and thereupon, by writ of

Hudson *et al.* v. Bunch *et al.*

certiorari, such amended and corrected record was brought here on this appeal.

Many of the alleged errors of which appellants' counsel complained in their brief of this cause, were obviated or shown not to exist by the amended record subsequently filed herein, and such errors, of course, we need not notice further in this opinion. This conclusion practically disposes of the questions presented, or intended to be presented, by the first nine errors assigned by appellants on the record originally filed by them on this appeal, and especially so, we think, as their learned counsel have filed no further brief herein since the record bearing on those questions was amended below, and such amended record was brought into this court on the appeal herein.

The tenth error of which appellants complain is assigned as follows: "That the St. Joseph Circuit Court had no jurisdiction in this cause to assess and adjudge and confirm assessments for drainage against appellants' lands, situate in Marshall county, Indiana."

The jurisdictional question intended to be presented here by this assignment of error, has been decided by this court adversely to the appellants herein in a number of cases, wherein it has been held that the court of the county in which the petitioner resides and the proceeding is commenced, has jurisdiction and authority to establish a ditch extending into another county. *Shaw v. State, etc.*, 97 Ind. 23; *Crist v. State, ex rel.*, 97 Ind. 389; *Buchanan v. Rader*, 97 Ind. 605; *State, for use of, etc., v. Turvey*, 99 Ind. 599; *Meranda v. Spurlin*, 100 Ind. 380; *Updegraff v. Palmer*, 107 Ind. 181. Upon the authority of the cases cited, it must be held in the cause now before us that the St. Joseph Circuit Court had jurisdiction and authority to assess appellants' lands, situate in Marshall county, with the cost of drainage, and to confirm by its judgment assessments made thereon under its order and direction.

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Appellants next complain of the alleged error of the court below in overruling their motion for a new trial. In this motion the only causes assigned for such new trial were (1) that the finding of the court was contrary to law, (2) that the finding of the court was not sustained by sufficient evidence, and (3) for alleged error of law occurring at the trial and excepted to by appellants, in that the court refused, upon appellants' demand, to submit to a jury the trial of the issue tendered by the first cause assigned in their remonstrance herein, namely: "That the report of the commissioners is not according to law."

The first two of these causes for a new trial present here a single question, which may be thus stated: Is there legal evidence in the record of this cause which fairly sustains, or tends to sustain, the finding of the court below on every material point? If this question must be answered in the affirmative, and from our examination of the evidence we think it must, it is certain that, under our decisions, it can not be held here that the court erred in overruling appellants' motion for a new trial, for the first two causes assigned therefor. This court will not weigh the evidence, nor attempt to determine its preponderance either for or against the finding of the trial court. *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73; *Cornelius v. Coughlin*, 86 Ind. 461; *Beck v. Bundy*, 92 Ind. 145; *Allyn v. Allyn*, 108 Ind. 327; *Kopelke v. Kopelke*, 112 Ind. 435; *Spear v. Whitsett*, 115 Ind. 160.

The third cause assigned for a new trial is not a proper cause for a new trial, and presents no question here. The first cause of remonstrance assigned by appellants tendered no issue for trial. It was too indefinite for any purpose. In a remonstrance against the report of the commissioners it is not sufficient to use the general terms of the statute that "the report is not according to law." The remonstrance must specify the particulars in which it is claimed that the report is not according to law. *Higbee v. Peed*, 98 Ind. 420; *Ander-*

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son v. Baker, 98 Ind. 587; *Meranda v. Spurlin*, *supra*; *Osborn v. Sutton*, 108 Ind. 443.

Some other matters are complained of here as erroneous on behalf of appellants; but, in every instance, these have been substantially obviated or shown not to exist by the amended record of this cause, and we need not consider them.

After a thorough examination of the record as amended, we have not found, nor have appellants' counsel pointed out, any error therein which, in our opinion, authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Oct. 24, 1888.

No. 13,368.

CARNAHAN ET AL. v. MCCORD.

FRAUDULENT CONVEYANCE.—*Trust*.—*Innocent Purchaser*.—One who has purchased land and paid a valuable consideration therefor in good faith, without notice of the fraudulent purpose of the grantor, acquires a good title, under section 2970, R. S. 1881, as against the grantor's creditors.

SAME.—*Judgment*.—*Lien*.—*Notice*.—Where a husband has caused land to be conveyed to his wife, after which a judgment is taken against him, such judgment does not constitute a lien as against an innocent purchaser from the wife, nor is such purchaser, in the absence of actual knowledge, bound to take notice of the judgment.

From the Daviess Circuit Court.

J. Baker, for appellants.

J. M. Barr, for appellee.

MITCHELL, J.—Mary McCord instituted this proceeding

Carnahan et al. v. McCord.

against Magnus J. Carnahan and Francis A. Ward, the latter being the sheriff of Daviess county, to enjoin the sale of certain real estate.

The plaintiff charged in her complaint that the sheriff was threatening to levy upon and sell certain real estate of which she was the owner, to satisfy an execution issued upon a judgment recovered by the defendant Carnahan against George W. Chandler.

The circuit court rendered final judgment perpetually enjoining the sale, according to the prayer of the complaint.

It is objected that the finding and judgment are contrary to law, and without support in the evidence. The facts are not disputed. So far as material they are as follows: On and prior to the 14th day of June, 1884, George W. Chandler was the owner and held the legal title to certain real estate in Daviess county, the value of which does not appear. On the date above mentioned, Chandler agreed to exchange his land for another tract in the same county, owned by Stencil C. Allen, the title to which stood in the name of Allen's father. Pursuant to agreement, Chandler and wife conveyed the land previously owned by the former to Allen, and in consideration thereof Allen's father conveyed the land now in controversy to Emily V., wife of George W. Chandler. While the land first above mentioned stood in the name of George W. Chandler, the latter became indebted to Carnahan to the amount of \$78.92, for which sum Carnahan afterwards recovered judgment in the Daviess Circuit Court. The judgment was recovered on the 20th day of January, 1885. This was after the exchange of land with Allen, and the conveyance to Mrs. Chandler. On the 2d day of August, 1885, the appellee, Mrs. McCord, purchased the land and took a conveyance from Chandler and wife. As a consideration for the conveyance, she transferred other property to Mrs. Chandler, which was, so far as appears, equal in value to that received. While Mrs. McCord knew that George W. Chandler exchanged his land for that conveyed by Allen to Mrs.

Chandler, and afterwards purchased by her, she had no knowledge that he was indebted at the time he caused it to be conveyed to his wife, and she had no knowledge of any intent on the part of Chandler to delay or defraud his creditors. Chandler had no other property subject to execution.

The argument for a reversal of the judgment is based upon the assumption that the conveyance by Allen to Emily V. Chandler, the consideration therefor having been paid by her husband, was presumptively fraudulent as against the creditors of the latter, and that, until a fraudulent intent is disproved, a trust must be deemed to have resulted in favor of the creditors of George M. Chandler, under section 2975, R. S. 1881. If the controversy were between Mrs. Chandler and the creditors of her husband, the statute relied upon might be available.

The infirmity in the appellants' argument lies in the fact that it loses sight of the testimony which shows that Emily V. Chandler conveyed the land to Mrs. McCord, an innocent purchaser for value without notice of the alleged trust.

Section 2970, R. S. 1881, declares, in effect, that no trust, whether implied or created, shall defeat the title of a purchaser for value without notice of the trust.

This section affords an effectual shield for the protection of innocent purchasers. *Gray v. Turley*, 110 Ind. 254.

Where property fraudulently conveyed, or conveyed under such circumstances as to create a trust in favor of creditors, is found in the hands of a volunteer, or of one who took the conveyance with notice, it may be subjected to the payment of the grantor's debts. *Chamberlin v. Jones*, 114 Ind. 458; *Blair v. Smith*, 114 Ind. 114.

It can not be so subjected as against one who purchased and paid a valuable consideration in good faith, without notice of the fraudulent purpose of the grantor. *Studabaker v. Langard*, 79 Ind. 320; *Johnston v. Field*, 62 Ind. 377; *Stewart v. English*, 6 Ind. 176; *First Nat'l Bank v. Carter*, 89 Ind. 317; *Evans v. Nealis*, 69 Ind. 148.

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Even though George W. Chandler paid the consideration and caused the conveyance to be taken in the name of his wife, with the intent to hinder and delay his creditors, the title of a subsequent purchaser, who had no notice of the fraud, and who paid a valuable consideration, can not be disturbed. *Jewett v. Meech*, 101 Ind. 289; *Willis v. Thompson*, 93 Ind. 62; *Barkley v. Tapp*, 87 Ind. 25; *Smith v. Selz*, 114 Ind. 229.

The land stood in the name of Emily V. Chandler at the time the judgment was taken against George W. Chandler. As against an innocent purchaser, a judgment so taken does not constitute a lien on the land, nor was the purchaser, in the absence of actual knowledge, bound to take notice of the judgment.

There was no error. The judgment is affirmed, with costs.
Filed Oct. 11, 1888.

116	70
123	123
116	70
126	496
116	70
133	146
116	70
152	700

No. 13,255.

WILLIAMS ET AL. v. OWEN ET AL.

DEED.—Grant of Income of Land.—Effect of.—The general rule is, that the grant of the income of land carries an estate in the land itself.

SAME.—Life-Estate.—Deed Construed.—A grantor conveyed and warranted to A., B. and C., "and Z. to have his support off of said farm during his lifetime," certain land. After the description was the following: "It is understood that rents and profits of this farm go to maintain my son, Z. At his death my grandchildren are to have the same in fee simple, after my death, as above stated."

Held, that Z. took a life-estate in the land.

From the Posey Circuit Court.

W. P. Edson and *F. D. Wimmer*, for appellants.

E. M. Spencer and *G. V. Menzies*, for appellees.

Williams *et al.* v. Owen *et al.*

ELLIOTT, J.—The question in this case is whether Zephania Williams had such an estate in the land granted to him by William Williams as authorized the sheriff to seize and sell it upon execution. The deed, omitting the formal parts, reads thus :

“This Indenture Witnesseth, that William Williams and Irene Williams, his wife, of Posey county, State of Indiana, convey and warrant to William Ennis Williams, James Urbane Williams, and George I. Williams, Jr., and Zephania Williams to have his support off of said farm during his lifetime, of Vanderburgh county, in the State of Indiana, for the sum of one dollar, the following real estate, in Posey county, in the State of Indiana, to wit : The east half of the southwest quarter of section thirty-one (31), township four (4) south, range fourteen (14) west. It is understood that rents and profits of this farm go to maintain my son, Z. Williams. At his death my grandchildren are to have the same in fee simple, after my death, as above stated.”

It is a familiar rule that all the parts of a deed must be construed together, and, if it can be avoided, no part shall be deemed ineffective.

The clause in the deed before us which reads thus : “At his death my grandchildren are to have the same in fee simple, after my death, as above stated,” is sufficient to vest in Zephania Williams a life-estate, and it is not inconsistent with the other provisions of the deed. It is, in truth, consistent with them, for the general rule is, that the grant of the income of land carries an estate in the land itself. *Reed v. Reed*, 9 Mass. 372 ; *Fox v. Phelps*, 17 Wend. 393 ; 2 Redfield Wills (2d ed.), 334 ; 3 Washburn Real Property (5th ed.), pp. 405, 565.

There is, therefore, a grant of an estate in the land itself, for, taking all the provisions of the deed together, it is clear, as KENYON, C. J., said in *Rex v. Inhabitants, etc.*, 4 T. R. 177, 181, that they show “that the whole estate was intended to be reserved to him.”

Rupert v. Martz.

The case of *Stout v. Dunning*, 72 Ind. 343, carries the rule much farther than we are required to do here, and we can not reverse this judgment without overruling that case, which we are not inclined to do.

Judgment affirmed.

Filed Oct. 24, 1888.

No. 13,384.

RUPERT v. MARTZ.

JUDGMENT.—*Relief from.*—*Surprise, etc.*—*Complaint.*—*Showing of Meritorious Defence.*—A complaint under section 396, R. S. 1881, to be relieved from a judgment on account of surprise, inadvertence or excusable neglect, is bad unless it shows a meritorious defence to the original action.

SAME.—*Legal Remedies.*—*Vested Rights.*—*Obligation of Contracts.*—*Constitutional Law.*—There are no vested rights in the law generally, nor in legal remedies, and changes therein by the Legislature are not within the inhibition of section 10 of article 1 of the Constitution of the United States, unless of such a character as to materially affect the obligation of contracts.

SAME.—*Review of Judgment.*—*Remedy May be Changed or Abolished.*—The statute providing for a review of judgments merely prescribes a remedy, and this remedy the Legislature may change or take away altogether.

SAME.—*Limitation of Action.*—*Disability.*—*Repeal of Statute.*—The statute of 1881 (R. S. 1881, sections 615, 616), limiting the bringing of proceedings for review of judgments on account of error of law to one year after the removal of disability, repealed the prior statute allowing such proceedings to be brought within three years after the removal of disability; and all proceedings for review thereafter filed must be brought within the terms of the law of 1881, without regard to the time when the judgment was rendered.

SAME.—*New Action After Failure.*—*Statute Construed.*—The provision in section 299, R. S. 1881, that if, after the commencement of an action,

116 72
126 133

116 72
141 408

116 72
155 149

116 72
167 28

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the plaintiff fail therein, a new action may be brought within five years, and be deemed a continuation of the first, for certain purposes, has no application to special proceedings for the review of judgments as provided by section 615.

From the Huntington Circuit Court.

B. F. Ibach, B. M. Cobb and J. G. Ibach, for appellant.

J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellee.

ZOLLARS, J.—The purpose of this action by appellant is to avoid a decree quieting the title to the land described in the complaint in her father.

So far as it is necessary in this connection to refer to the complaint, the following brief and general summary is sufficient :

Appellant's mother died intestate in 1864. At the time of her death the fee to the land in dispute here was in her. In 1871, when appellant was a minor, her father, Benjamin Rupert, commenced an action against her to have the title to the land quieted in him. She was the sole defendant, and, having been duly served with process, a guardian *ad litem* was appointed for her by the court. The guardian *ad litem* filed an answer, and the cause having been submitted to the court, a decree was rendered on the 5th day of December, 1871, quieting the title to the land in the father. Subsequent to the decree the father conveyed all the title he had to the land to Cornelius Martz, appellee herein and the defendant below. And subsequent to that conveyance, and before the commencement of this action, the father died.

In their arguments here, counsel for appellant seem to assume that the complaint may be regarded both as an application to be relieved from the decree on account of surprise, inadvertence and excusable neglect on the part of appellant, and as an action for a review of the proceedings and decree quieting the title in the father.

One of the errors assigned here is, that the court below

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erred in overruling a demurrer to appellee's answer. In that answer it is averred, amongst other things, that this action was not commenced by appellant within one year after she attained the age of twenty-one years, and that she, at no time, had been under any other legal disability.

Section 396, R. S. 1881, provides that the trial courts shall relieve parties from judgments taken against them through their mistake, inadvertence, surprise or excusable neglect, on complaint or motion filed within two years.

It is not necessary to inquire here whether or not there is any statute which extends the time beyond the disability of infancy in which to make an application to be relieved from a judgment under the above statute. It is sufficient to say that, whether the answer is good or bad, it is sufficient to meet the complaint so far as it may, in any sense, be regarded as an application to be relieved from the decree on account of surprise, etc. A bad answer is sufficient for a bad complaint.

To make a complaint or application good under the above statute, it must show that the applicant has a valid or meritorious defence to the original action, and what that defence is. *Yancy v. Teter*, 39 Ind. 305; *Lee v. Basey*, 85 Ind. 543; *Wills v. Browning*, 96 Ind. 149; *Woods v. Brown*, 93 Ind. 164.

In the complaint in this case it is not shown, nor attempted to be shown, that appellant had, or has, any valid or meritorious defence to the action by her father.

Without saying more in relation to the argument of counsel for appellant, which seems to treat the complaint as an application to set aside the decree on account of surprise, etc., we turn to the other branch of the argument, which treats the case as an action for a review of the proceedings and decree.

In disposing of this branch of the case we decide nothing as to the sufficiency of the complaint, but confine ourselves to the questions raised by the answer.

Rupert v. Martz.

As before stated, the decree was rendered in 1871, when appellant was a minor. The statute then in force provided that any party to a judgment might file in the court where such judgment was rendered a complaint for a review of the proceedings and judgment at any time within three years next after the rendition thereof, and that any person under legal disabilities might file such complaint at any time within three years after the disability was removed. 2 R. S. 1876, p. 247, section 586.

This action was commenced in May, 1885. It is averred in the answer that appellant attained the age of twenty-one years two years prior to that time, and that her action was, therefore, not commenced within one year after becoming twenty-one years of age.

The act which went into effect on the 19th day of September, 1881, superseded the act above mentioned.

In a case like this, where the review is sought upon the ground of error of law appearing in the proceedings and judgment, the latter act provides that the complaint for review must be filed within one year from the rendition of the judgment, and that any person under legal disabilities may file such complaint at any time within one year after the disability is removed. R. S. 1881, sections 615, 616.

Had the prior act remained in force, appellant would have had three years after attaining the age of twenty-one years in which to commence this action, or until May, 1886. Under the later act, the time within which persons may commence such an action after attaining the age of twenty-one years is cut down to one year, and, as applied to appellant's case, expired one year before this action was commenced.

Counsel for appellant argue that if the act of 1881 is applicable, it is, as to this case, unconstitutional, because it destroys a vested right, and is in violation of section 10 of article 1 of the Constitution of the United States, which inhibits the passage of laws by the States impairing the obligation of contracts.

Rupert v. Martz.

There are no vested rights in the law generally, nor in legal remedies, and hence changes in them by the Legislature do not fall within the constitutional inhibition, unless they are of such a character as to materially affect the obligation of contracts. *Davis v. Rupe*, 114 Ind. 588; *Bryson v. McCreary*, 102 Ind. 1, and cases there cited.

The statute providing for a review of judgments is not a contract, nor can it be properly said that it enters into contracts made by contracting parties, either as a part of the contracts or as a part of the remedy.

If such a statute confers a right at all, the right thus conferred is a mere statutory right, and having been conferred by the Legislature it may be changed or taken away by the Legislature.

Properly speaking, such a statute creates and prescribes a remedy whereby a person may, in a proper case, avoid a judgment rendered against him.

In the case before us the judgment which appellant seeks to review was not, and is not, a contract, nor did it grow out of, or rest upon, a contract between appellant and any other person. It would be difficult, therefore, to perceive how it could be properly said that the statute providing for a review of judgments was in any way a contract, or an element in a contract, in which appellant had any interest. As before stated, the statute prescribed a remedy simply for a review of judgments, and that remedy the Legislature had a right to change or take away altogether. See *Board, etc., v. Ruckman*, 57 Ind. 96; *Henderson v. State, ex rel.*, 58 Ind. 244; *Moor v. Seaton*, 31 Ind. 11.

So far as concerns appellant and the decree in her father's favor, the act of 1881 neither violated any contract, overthrew any vested right, nor destroyed any remedy given for the enforcement of a contract.

Counsel for appellant argue that the act of 1881 is not retroactive, and, therefore, can not apply to her case, the decree

Rupert v. Martz.

in her father's favor having been rendered before it was passed.

That argument can be of no avail to appellant. One thing is certain, and that is, that the act of 1881 repealed, by implication, the previous act which provided for the review of judgments.

The act in force at the time the decree in favor of the father was rendered has not been in force for any purpose since the taking effect of the act of 1881. If the act of 1881 is not applicable to appellant's case, she is without any remedy for a review of the decree which she seeks to review. On the other hand, if the act of 1881 is applicable to her case, she failed to bring the case within its provisions, in that she failed to commence her action within one year after her disability of infancy was removed.

This is as much as we need decide in this case. What may be the proper construction of the act of 1881 as applied to the different cases mentioned by counsel in argument may be more properly determined when such cases shall come before us. It is enough here that upon any view that may be taken the answer under consideration is sufficient.

Appellant sought to avoid the answer by a reply in which she averred that in 1882 she commenced an action similar to the present action, and having failed to bring in the necessary parties as defendants, she dismissed the action by the advice and consent of the court. The object of that reply was to bring the case within the terms of section 299, R. S. 1881, which provides that "If, after the commencement of an action, the plaintiff fail therein, from any cause except negligence in the prosecution, * * * a new action may be brought within five years after such determination, and be deemed a continuation of the first, for the purposes herein contemplated."

That section is found in article 6 of the code, and has reference to actions limited by the different sections of that article. It has no reference at all to the special proceeding

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for the review of judgments as provided by the subsequent section 615, found in article 24 of the code. See *Cornell v. Goodrich*, 21 Ind. 179. See, also, *McCurdy v. Love*, 97 Ind. 62.

The court below did not err in sustaining the demurrer to the reply.

Judgment affirmed, with costs.

Filed Oct. 23, 1888.

116	78
116	256
116	481
120	141
122	381
116	78
122	470
116	78
130	361
116	78
132	414
116	78
137	80
137	390
116	78
143	676
116	78
149	248

No. 13,417.

STONE, ADMINISTRATOR, v. BROWN ET AL.

FRAUDULENT CONVEYANCE.—*Statute of Limitations.*—*Constructive Trust.*—

Under section 292, R. S. 1881, an action to set aside a fraudulent conveyance must be brought within six years, and the operation of the statute can not be avoided by showing that by the conveyance a constructive trust was created for the grantor's creditors.

SAME.—*Concealment of Cause of Action.*—*When Sufficient to Avoid Statute of Limitations.*—The concealment of a cause of action, which, under section 300, R. S. 1881, will avoid the operation of the statute of limitations, must be affirmative in character, and the particular acts of concealment or misrepresentation must be set out in the pleading, together with the circumstances of the discovery, and the delay which has occurred must be shown to be consistent with diligence.

SAME.—*Husband and Wife.*—*When Wife May Acquire Title as Against Creditors.*—Where a husband's land is encumbered by liens to the full value of his estate therein, and the wife, with money furnished by relatives and friends, has become the owner thereof by paying the claims of creditors who have acquired title by judicial sales and by conveyances from the husband and wife, and the subsequent payment of other liens, she will hold the same freed from the claims of the general creditors of her husband.

SAME.—*Purchase-Money.*—*Payment.*—*Proceeds of Crops.*—In such case, so far

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as the purchase-money was paid from the proceeds of crops raised on the land after it was conveyed to the wife, it was, in contemplation of law, paid by her, even though the husband assisted in producing the crops by managing the farm.

SPECIAL FINDING.—*Silence as to Fact in Issue.*—*Presumption.*—If the court fails to find on all the facts within the issues, it will be assumed that the party upon whom the burden of the issue in respect to the omitted fact rested, failed to produce evidence in support thereof.

BILL OF EXCEPTIONS.—*Signing.*—*Authentication of Evidence.*—The signing of a mere skeleton bill of exceptions, which undertakes to incorporate the long-hand manuscript of the evidence by a "here insert," does not amount to an authentication of the evidence by the court.

From the Howard Circuit Court.

J. O'Brien and C. C. Shirley, for appellant.

M. Bell, W. C. Purdum, J. C. Blacklidge, W. E. Blacklidge
and *B. C. Moon*, for appellees.

MITCHELL, J.—Complaint in two paragraphs by Stone, administrator, against Rebecca S. Brown, George W. Brown and others, to subject certain real estate, charged to have been fraudulently transferred to Rebecca S. Brown, to the satisfaction of an indebtedness alleged to be due the estate of Eaton P. Stone, deceased, from George W. Brown.

The first question made on appellant's behalf arises on the ruling of the court in overruling a demurrer to an answer filed by Mrs. Brown, alleging that the cause of action did not accrue within six years next before the bringing of the suit.

The record shows that the suit was commenced in July, 1885, and it appears from averments contained in the complaint that the conveyances which are assailed as fraudulent were executed more than ten years before the suit was commenced.

The first paragraph of the complaint was framed upon the theory that it was necessary to set up facts in avoidance of the statute, while the second paragraph seeks to avoid the statute by alleging that Rebecca S. Brown took the title in trust for her husband, George W. Brown.

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After setting out the facts which, it was assumed, showed that the conveyances were a fraud upon the creditors of George W. Brown, the following averment was introduced into the first paragraph of the complaint, viz.: "And said George W. Brown and Rebecca S. Brown, for the purpose of carrying out and completing their fraud, did, by common agreement between them, give out in words and speeches that said Rebecca S. Brown had obtained money from her friends to make the several purchases, as herein stated, for the purpose of completing the fraud and misleading and deceiving the creditors of said George W. Brown, and this plaintiff never knew that such representations were wholly false, and only made to deceive, until within ten days of the time of filing this complaint."

It is contended that the plea setting up the statute is not good as to the first paragraph, because of the foregoing averment therein, and that, because the second paragraph alleges that Mrs. Brown took the title in trust for the benefit of her husband, the statute does not begin to run until the trust was repudiated or disavowed.

Section 292, R. S. 1881, which limits the time within which actions may be commenced, provides that actions for relief against frauds shall be commenced within six years after the cause of action accrued, and not afterwards. This statute applies to actions to set aside fraudulent conveyances, and its operation can not be avoided by setting up facts which would make the fraudulent grantee a trustee, by legal construction, for the grantor's creditors. Constructive trusts, or trusts which the law forces upon a party in favor of creditors, are not exempt from the operation of the statute. If the facts stated in the second paragraph create a trust, it is, as respects the creditors of George W. Brown, a constructive trust in fraud of their rights as creditors. *Musselman v. Kent*, 33 Ind. 452; *Smith v. Calloway*, 7 Blackf. 86; *Newsom v. Board*, etc., 103 Ind. 526.

When a person liable to an action conceals the fact from

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the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action. Section 300, R. S. 1881.

As has often been declared, the statute of limitations is a statute of repose, and in order to bring a case within the section above referred to, and avoid the operation of the statute, something more than silence, or mere general declarations or speeches, on the part of the person liable, must be shown.

It must appear that some trick or artifice has been employed to prevent inquiry or elude investigation, or calculated to mislead and hinder the party entitled from obtaining information, by the use of ordinary diligence, that a right of action exists; or it must appear that the facts were misrepresented to or concealed from the party, by some positive acts or declarations, when inquiry was being made or information sought, and the particular acts of concealment or misrepresentation made must be set out in the pleading. Besides, "The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence." *Wood v. Carpenter*, 101 U. S. 135. *Jones v. State*, 14 Ind. 120; *Stanley v. Stanton*, 36 Ind. 445; *Wynne v. Cornelison*, 52 Ind. 312; *State v. Fries*, 53 Ind. 489; *Robinson v. State*, 57 Ind. 113; *Jackson v. Buchanan*, 59 Ind. 390; *Ware v. State, ex rel.*, 74 Ind. 181; *Churchman v. City of Indianapolis*, 110 Ind. 259.

It is not averred in the present case that the "words and speeches" which the defendants Brown and wife agreed to give out, concerning the purchase of the land by Mrs. Brown, were ever uttered in the presence of any one, or, if uttered, that they were communicated to, and acted upon, by the plaintiff. Nor does it appear that any inquiry was ever made concerning their truth, or that any diligence whatever was

Stone, Administrator, v. Brown *et al.*

employed to discover the facts, nor are the circumstances of the discovery stated. The court did not err, therefore, in holding the plea of the statute good. The statute was also well pleaded to the second paragraph.

The facts as specially found by the court show that on and prior to July 3d, 1869, the defendant George W. Brown was the owner of two hundred and forty acres of land in Howard county, which he had inherited from his father. The land was worth from twenty to twenty-five dollars per acre. He became overwhelmed with debt, and his land was covered with judgment and mortgage liens, a portion of the land having been sold at sheriff's sale. On the date above mentioned he conveyed the entire tract, his wife joining, to Nathaniel Bell by an absolute deed, the latter having furnished him the money with which to redeem so much of his land as had been sold on execution. At the time the deed was made Bell gave back an agreement conditioned that if Brown would, on or before the 3d day of March, 1870, pay him the sum of \$976.85 he would sell and convey to him the land theretofore conveyed by Brown and wife, but that if the money was not paid at the time stipulated, the agreement was to be void.

The land was encumbered by other liens at the time the conveyance was made to Bell. Brown remained in possession, but was wholly unable to pay according to the agreement with Bell. On the 26th day of October, 1870, after the contract was forfeited, Eleanor Brown, mother of George W., paid Bell \$2,200, and caused the latter to convey the land theretofore conveyed to him by Brown and wife to Rebecca S. Brown, the latter agreeing in consideration thereof to maintain and support Eleanor Brown during her lifetime. After the conveyance to Mrs. Brown, another parcel of the land was sold on a decree of foreclosure, and the title passed into the hands of, and became absolute in, Milton Bell, who subsequently, upon an arrangement between himself and Mrs. Brown, conveyed to the latter.

Without detailing the facts specially found at greater length, it is sufficient to say that with the money paid by Eleanor Brown, and with eleven hundred and fifty-two dollars furnished by the father of Rebecca S. Brown, and by executing sundry mortgages upon the land, and by applying the proceeds of crops raised thereon by the joint labor of herself and husband and their children, the title to all the land has been secured in Rebecca S. Brown, subject to some encumbrances that still remain thereon, and this has been done without depriving the general creditors of George W. Brown of anything available to them to pay their debts.

It is evident that the lands were encumbered to the full extent of the value of the estate of George W. Brown therein, and that they would have been wholly lost, both to his wife and family and to his general creditors, but for the intervention of his mother and father-in-law, and other friends, who furnished the money and caused the lands to be redeemed and conveyed to his wife.

Under such circumstances, even though the purpose of the parties was to put the property beyond the reach of the husband's creditors, by causing it to be conveyed to his wife, the creditors are not harmed, and have no right to complain. *McLean v. Hess*, 106 Ind. 555, and cases cited.

If, through the bounty of her father and mother-in-law, and other friends, Mrs. Brown has been enabled to save the farm for herself and family, why should the creditors of her husband be permitted to come in and sweep it away? *Cooper v. Ham*, 49 Ind. 393; *Evans v. Nealis*, 69 Ind. 148; *Bremmerman v. Jennings*, 101 Ind. 253.

She is not in the position of a volunteer, and the authorities relating to voluntary dispositions of their property by debtors are not controlling in a case like the present.

So far as the purchase-money was paid from the proceeds of crops raised on the land after it was conveyed to Mrs. Brown, even though her husband assisted in producing the crops by managing the farm, the payment was nevertheless,

Brown et al. v. Grove.

in contemplation of law, made by her. *Scott v. Hudson*, 86 Ind. 286, and cases cited.

The conclusions of law upon the facts found were correctly stated in favor of Rebecca S. Brown.

There was no ground for a motion for a *venire de novo*. If the court fails to find on all the facts within the issues, it will be assumed that the party upon whom was the burden of the issue in respect to the omitted fact, failed to produce evidence in support thereof. *Mitchell v. Colglazier*, 106 Ind. 464.

The original bill of exceptions, which is properly certified up in response to a writ of *certiorari*, brings the case, so far as questions depending upon the evidence are concerned, directly within the ruling in *Wagoner v. Wilson*, 108 Ind. 210. The signing of a mere skeleton bill of exceptions, which undertakes to incorporate the long-hand manuscript of the evidence by a "here insert," does not amount to an authentication of the evidence by the court. We find no error.

The judgment is affirmed, with costs.

Filed Oct. 24, 1888.

No. 13,999.

BROWN ET AL. v. GROVE.

DIVORCE.—*Fraud in Procuring Decree.—Annulment.*—Where a husband procures a petition for divorce to be filed in the name of his wife, without her knowledge, and he files an answer and a divorce is granted, the wife may, upon discovering the fraud after his death, and more than twenty years after the decree was granted, have the same annulled by a proper proceeding for that purpose.

SAME.—*Notice of Decree.*—The wife was not bound to know of the existence of the decree merely because it was of record.

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48	518
16	84
54	379
16	84
60	423
16	84
61	124

Brown *et al.* v. Grove.

SAME.—Witness.—Proceeding to Which Heirs are Parties.—In the proceeding against the heirs of the deceased husband to annul the decree, the wife is a competent witness as to what she did or did not do concerning the petition in the divorce suit.

NEW TRIAL.—Newly Discovered Evidence.—Impeaching Evidence.—A new trial will not be granted to admit the introduction of impeaching evidence.

From the Marion Circuit Court.

L. Howland and *L. O. Bailey*, for appellants.

H. Dailey and *F. McCray*, for appellee.

ELLIOTT, J.—It is alleged in the complaint of the appellee that she was married to Henry W. Grove in 1851; that in March, 1863, a decree of divorce was obtained by fraud; that the petition for divorce was filed in her name without her knowledge or consent; that she did not authorize the solicitor whose name is signed to the petition, purporting to have been filed by her, to file any petition; that the petition was filed and procured without her knowledge by Henry W. Grove, and that on the day it was filed he appeared in person and filed an answer.

It is further alleged that at the time the petition was filed she was ill and almost blind; that soon after the decree was entered she became, and has since been, totally blind, and for a great part of the time has been an inmate of the county poor-house.

It is also averred that she had no notice or knowledge of the proceedings until long after the death of Henry W. Grove, and that he died on the 7th day of December, 1883.

The complaint is good. A husband who procures a petition to be filed in the name of his wife against himself without her knowledge, and answers the complaint filed by his own procurement, perpetrates a fraud upon her and upon the court. Such conduct courts abhor. It would be a mockery to uphold a decree obtained by such a fraud. Courts have inherent power to annul decrees obtained by means such as those re-

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sorted to by Henry W. Grove. *Nealis v. Dicks*, 72 Ind. 374; *Cavanaugh v. Smith*, 84 Ind. 380; *Earle v. Earle*, 91 Ind. 27.

The appellee was neither plaintiff nor defendant. Henry W. Grove was the sole party to the suit. In truth, there was no suit, for there was no plaintiff. It is an ancient maxim that "fraud vitiates every thing," and it is impossible to conceive of a case to which that maxim more strongly and justly applies than the one before us. The proceeding is utterly destitute of force. The infirmity is remediless. The defect is incurable.

The contention of counsel that the appellee was bound to know of the existence of the decree because it was of record, is not only without strength, but is without plausibility. It would be strange, indeed, if a woman was bound to examine the records to ascertain whether she had herself ever instituted a suit for divorce.

The appellee was a competent witness. She had a right to testify as to what she herself did or did not do concerning the petition in the divorce suit. What she did or did not do was a matter neither within the spirit nor the letter of the law prohibiting parties from testifying where heirs are interested. It may be true that as to some other matters she was not competent, but the only objection presented was as to her competency to testify at all, and that objection was properly overruled.

The only question we are required to decide, and the only question we do decide, is, that upon some of the matters involved the appellee had a right to testify, and that, as she was as to those matters a competent witness, it would have been error to have ruled her totally incompetent.

The only argument made by appellants' counsel upon this point is this: "The heirs are parties. Her claim affects the estate, and, under the statutes of this State, the husband being dead, the plaintiff was incompetent to testify as to matters prior to her husband's death." No authorities are cited, nor other reasons adduced, and what we have said disposes

of the question as it is presented to us. This suit, it must be remembered, is one to annul a decree of divorce, and as to many matters the appellee was a competent witness, and the only question presented is whether she was competent to testify at all.

There was no error in excluding the note and mortgage executed to Mr. Goodwin. There was no evidence that they were executed by her, and without such evidence they were not admissible, since to make them competent for any purpose it was indispensably necessary to prove that they were executed by her.

The appellants assert that they were entitled to a new trial, upon the ground of newly discovered evidence, and thus present that point: "This reason was highly material and important to the appellants. It clearly establishes the identity of plaintiff with the Emily J. Grove who borrowed the money from Goodwin the same year her divorce was granted, representing herself as a divorced and single woman." This can not justly be regarded as such a presentation of the question as the rules of practice require, since it does not enable us to determine the specific grounds upon which the ruling of the trial court is assailed. We have, however, given the question attention, and we are clear that the utmost force that can be allotted the newly discovered evidence, if, indeed, even so much can be given it, is that it tends to impeach the the appellee. Over and over again it has been decided that a new trial will not be granted to admit the introduction of impeaching evidence.

Counsel state some other questions upon the rulings in admitting and excluding evidence which they say the record presents, but they do not argue them, and they are, therefore, deemed waived.

The evidence fully sustains the finding of the trial court.

We think it proper to say that the issue tried and determined was whether the appellee had a right to have the decree of divorce annulled, and that is the only issue upon

 Pool v. Anderson.

which our judgment or that of the trial court is absolutely and directly conclusive. Whether property rights acquired upon the faith of the validity of the decree are affected, we have not inquired, and, of course, have not decided. All that we do decide is, that Mrs. Grove had a right to relief against the decree procured by fraud. When she claims, should she ever do so, property rights, then other questions may arise, but now we decide only that she had a right to be relieved from the fraudulent decree.

Judgment affirmed.

Filed Oct. 23, 1888.

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117	148
116	88
126	555

 No. 13,401.

POOL v. ANDERSON.

PROMISSORY NOTE.—*Negotiability.*—*Irregular Endorsement.*—One who, before delivery, writes his name upon the back of a negotiable promissory note, of which he is neither the payee nor endorsee, is, in the absence of explanatory evidence, liable to the payee only as endorser; but it is not so where the note is not negotiable by the law merchant, in the absence of a special contract to that effect.

SAME.—*Endorsement by Stranger Before Delivery to Payee.*—*Liability.*—Where a person, not the payee of a promissory note not negotiable by the law merchant, places his signature on the back of the paper at or prior to the time of its inception, without making an express contract defining the nature and extent of his undertaking, he will be held liable to the payee as a surety or joint promisor.

SAME.—*Notice of Non-Payment.*—A surety or joint promisor is bound to take notice of the default of his principal or joint maker, and as to either notice of non-payment is not necessary.

SAME.—*Stipulation Waiving Notice of Non-Payment.*—*When Material.*—A stipulation in a promissory note waiving notice of non-payment is material

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only when the note is governed by the law merchant and capable of strict endorsement.

From the Rush Circuit Court.

J. K. Ewing and *C. Ewing*, for appellant.

B. L. Smith and *W. J. Henley*, for appellee.

MITCHELL, J.—This was an action by Thomas A. Pool against William F. Spradling, Daniel G. Neff and James W. Anderson to recover the amount due on a promissory note, dated August 14th, 1884, calling for the payment of \$850, with eight per cent. interest, due twelve months after date. The note was in the ordinary form of paper not negotiable by the law merchant, and was payable to the plaintiff at Greensburgh, Indiana. Spradling and Neff signed their names as makers on the face of the note, in the customary manner, while the name of Anderson was written across the back, before it was delivered to the payee, who brought the suit. Beyond the fact that the paper was signed in the manner described, there is nothing to indicate the relation of Anderson to the note, or to the other defendants.

Assuming that it was necessary to show an excuse for not having used diligence by bringing suit in the first term of court after the maturity of the note, in order to hold Anderson, the plaintiff adapted the first paragraph of his complaint so as to rely upon a stipulation, such as is usually found in mercantile paper, whereby the drawers and endorsers agree to waive presentment for payment, and protest and notice of non-payment, etc., as an excuse for not having sued.

The court below was of the opinion, nevertheless, that the complaint did not state facts sufficient to constitute a cause of action against Anderson, and gave judgment accordingly upon a demurrer filed by the latter. The conclusion at which we have arrived renders it unnecessary that we should examine any other question than that which arises upon the

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ruling on the demurrer to the first paragraph of the complaint.

Counsel seek to maintain the judgment appealed from upon the assumption that the unexplained signature of a third person placed upon the back of non-mercantile paper, or paper negotiable under the statute merely, before it is delivered to the payee, imposes, *prima facie*, the liability of an endorser upon the person whose name is so signed, and that a waiver of notice of non-payment contained in the body of the note is not an available excuse for failing to use the diligence required in order to hold an endorser of such paper liable. *Drake v. Markle*, 21 Ind. 433 (83 Am. Dec. 358), *Roberts v. Masters*, 40 Ind. 461, *Pennington v. Hamilton*, 50 Ind. 397, *Dale v. Moffitt*, 22 Ind. 113, and other decisions of this court, are relied on as sustaining the view contended for.

The law merchant attributes to the act of one who endorses a negotiable instrument in blank, an intent thereby to warrant the payment of the note, provided it is presented to the maker at maturity, and due notice of the fact of non-payment is given to the endorser. Ordinarily, and in the regular course, the endorsement of a bill or note by one not a party thereto follows the endorsement of the payee, and in such a case little difficulty is experienced in determining the liability assumed by the endorser to the person into whose hands the note may thereafter come.

The present case involves the liability of a stranger, who signed his name upon the back of a paper not negotiable by the law merchant, before it was delivered to the payee, who held the same when the suit was commenced. The inquiry is, what is the liability or obligation of one who thus signs to the payee?

The decisions of different courts present an irreconcilable conflict of views upon the general subject under consideration. It will be noted, however, that the cases in other jurisdictions relate almost exclusively to notes negotiable as inland

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bills of exchange. Whatever diversity exists in the decided cases, it can not be doubted that a stranger who writes his name on the back of a promissory note before it is delivered, whether it be negotiable or non-negotiable according to the law merchant, does so in order to give the maker credit, or the note currency, and with the intention to pledge himself in some shape for its payment. *Eilbert v. Finkbeiner*, 68 Pa. St. 243.

All the authorities concur in holding that the act constitutes a contract which is to be construed in such a way as to render it available to carry into effect the intention of the parties, consistent with settled rules of law. *Good v. Martin*, 95 U. S. 90; *Rey v. Simpson*, 22 How. 341; 15 Cent. L. J. 82.

The rule as established by the decisions of this court is to the effect that one who writes his name upon the back of a negotiable promissory note, of which he is neither the payee nor endorsee, before it is delivered, in the absence of extrinsic explanatory evidence, thereby assumes the liability of an endorser. *Kealing v. Vansickle*, 74 Ind. 529, and cases cited; *Houck v. Graham*, 106 Ind. 195; *Knopf v. Morel*, 111 Ind. 570.

Presumptively, his contract with the payee is that of an endorser of mercantile paper.

Without regard to the decisions in some of the other States, this rule, as applied to paper governed by the law merchant, must now be accepted as no longer open to question in this court. As respects paper of that character, the rule above stated has been uniformly applied for nearly a half century, and as stability and certainty in the law are of the first importance in commercial transactions, it is far better that a rule once settled should remain than that it should be so clearly right as to be beyond criticism.

The earlier decisions made a distinction between negotiable and non-negotiable paper. Thus in the case of *Wells v. Jackson*, 6 Blackf. 40, DEWEY, J., stated the rule in the fol-

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lowing language: "The deduction which we draw from these authorities is, that the blank indorsement of unnegotiable paper, made at the date of the contract, and unexplained by extrinsic testimony, confers upon the payee the authority to hold the indorser liable on the original contract, as a surety; and that a similar unexplained indorsement of negotiable paper renders the indorser liable only as indorser, with the ordinary rights and privileges incident to that character. But that in either case, the liability designed to be assumed, and the authority intended to be given by the indorsement, may be explained by the attendant circumstances, and the *prima facie* responsibility be changed into one of another kind."

The terms unnegotiable and negotiable were employed by the learned judge who wrote the opinion from which the above quotation is taken, advisedly, and in the light of a statute, not materially different from that now in force, regulating the assignability of promissory notes, and providing that notes drawn payable in a specified manner at a bank in this State should be negotiable as inland bills of exchange. The statute now in force, or one substantially like it, concerning promissory notes and bills of exchange, has been in existence in this State ever since the enactment of the law approved January 29th, 1818, which was passed by the second legislative assembly convened in the State. See Acts of 1818, p. 232.

This statute, although less comprehensive in its scope, has occupied and still supplies substantially the place in our commercial system that the statute of Anne does in the commercial law of England. 1 Daniel Neg. Inst., section 5; *Mix v. State Bank*, 13 Ind. 521.

So far as the statute places promissory notes upon the footing of inland bills of exchange, it subjects them to the law merchant and all its incidents, that law having been incorporated into our system as part of the common law. *Bullitt v. Scribner*, 1 Blackf. 13; *Holloway v. Porter*, 46 Ind. 62.

While it is true, the statute makes all promissory notes

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"negotiable by indorsement thereon, so as to vest the property thereof in each indorsee successively," only notes payable to order or bearer in a bank in this State are negotiable as inland bills of exchange. *Melton v. Gibson*, 97 Ind. 158.

It is clear, therefore, that the effect of the rule laid down in *Wells v. Jackson*, *supra*, was that where one, not the payee of a note not negotiable as an inland bill of exchange, wrote his name upon the back of the paper prior to or at the time of its inception, without any extrinsic agreement expressing the real nature of the obligation intended to be assumed, he thereby conferred authority upon the payee to hold him liable on the original contract as a surety or joint promisor, while a similar act in respect to a note negotiable as an inland bill subjected the person so signing presumably to the liability, and entitled him to the immunity, of an indorser. This rule, observing the distinction between negotiable and non-negotiable paper in a commercial sense, is logically maintainable, and can be supported upon principle and authority. It was followed and recognized for twenty years and more. *Early v. Foster*, 7 Blackf. 35; *Harris v. Pierce*, 6 Ind. 162; *Cecil v. Mix*, 6 Ind. 478; *Vore v. Hurst*, 13 Ind 551 (24 Am. Dec. 269); *Sill v. Leslie*, 16 Ind. 236.

In *Snyder v. Oatman*, 16 Ind. 265, the distinction between notes negotiable under the statute, so as to vest the property thereof in the endorsees successively, and those negotiable as inland bills, seems to have been abandoned.

In *Drake v. Markle*, 21 Ind. 433, while recognizing the rule as enunciated in *Wells v. Jackson*, *supra*, that the signing of negotiable and unnegotiable paper on the back by a stranger before delivery did not subject the person signing to the same *prima facie* liability, it was nevertheless distinctly ruled that, since every instrument having the requisite characteristics of a promissory note was negotiable under the statute, a person who signed a note so negotiable, although not as an inland bill of exchange, was presumably bound as an endorser. This case, as the head-note of the reporter cor-

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rectly indicates, overrules *Wells v. Jackson*, *supra*, and all the other decisions above cited, to the extent that they are, as we have already indicated, inconsistent with it. Some later cases have cited and followed *Drake v. Markle*, *supra*, and the previous decisions, without finding it necessary, upon the facts involved, to give attention to the apparently inconsistent conclusions arrived at in some of those cases.

The question confronts us in the present case in a manner different from that assumed in any of the decisions referred to, so far as we have observed.

On the appellant's behalf it is insisted that if one signing a note in the manner already described incurs the liability of an endorser, then the usual incidents peculiar to that relation must obtain, and that hence the waiver of notice of non-payment upon which the plaintiff relied in framing the first paragraph of his complaint was effectual to fix the liability of the defendant Anderson, and no further diligence was required. That the liability of an endorser, strictly speaking, is fixed by notice of non-payment, and that when his liability is once fixed the endorser has no legal cause of complaint on account of delay in bringing suit, and that notice of non-payment may be waived in such a case by a stipulation in the note such as that relied on, are propositions too familiar and well settled to justify elaboration. *Lowry v. Steele*, 27 Ind. 168; *Rooker v. Morris*, 61 Ind. 286; *Neal v. Wood*, 23 Ind. 523; *Fitch v. Citizens National Bank*, 97 Ind. 211; 2 Daniel Neg. Inst., sections 1090, 1095.

Accordingly, it was held in *Bronson v. Alexander*, 48 Ind. 244, following the settled rule, that persons whose liability was there in question, other than the payee, who signed their names upon the back of a promissory note payable in a bank in this State, became presumably liable as endorsers, and that as such they had been discharged for want of notice of the dishonor of the paper.

The proposition upon which the discussion rests must resolve itself into the following inquiry: Can a stranger who

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signs an ordinary promissory note not negotiable by the law merchant, under the circumstances disclosed in the present case, stand in the relation of an endorser to the payee to whom it is afterwards delivered, without a special contract to that effect? Upon principle there can be no other than a negative answer to this question.

This conclusion follows from the fact that the liability of one whose name appears upon a promissory note, no matter when or where it is written, or what the character of the note is, must depend upon a contract which is either expressed in words or implied by law. *Seymour v. Mickey*, 15 Ohio St. 515.

When a person other than the payee or endorsee signs his name upon the back of a note governed by the law merchant, before it has its inception, it may, without great impropriety, be held that commercial law supplies the undertaking into which he enters with the payee, which is in effect that if the maker fails to pay at maturity and the endorser is duly notified of the dishonor of the note, he will pay it. This, according to the rulings of this court, is the implied or commercial contract which the law imports into the transaction, in the absence of an express agreement of a different character, and a contract implied by law is as binding as if it were written in words. *Stack v. Beach*, 74 Ind. 571. To these rulings we adhere. This constitutes the person so signing, as between himself and the payee, *prima facie* a first endorser, with all the rights and liabilities incident to that relation. *Kealing v. Vansickle*, *supra*; 1 Daniel Neg. Inst., sections 714, 666.

One can not, however, become an endorser, in a commercial sense, of paper that is not negotiable according to the law merchant. *Vore v. Hurst*, *supra*; 1 Daniel Neg. Inst., section 709.

Hence, the signature of a third person placed on the back of a note not so negotiable, before its delivery to the payee,

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creates no implied or commercial contract whatever. *Chaddock v. Vanness*, 35 N. J. L. 517.

As has been remarked, it will be assumed that one who signs his name upon the back of a note, whatever its description may be, does so for some purpose, and that he intends to become responsible for its payment in pursuance of some contractual obligation. If, therefore, the law imports into the transaction no contract whatever, and there is no possibility of raising the ordinary obligation of an indorser, it must be assumed, until it appears whether any contract different from that written on the paper was entered into, and what the character of that contract was, that all those, other than the payee, who signed before the execution of the paper, whether upon the back or face, intended to become bound according to the terms of the note as joint promisors. It is true, one who writes a blank endorsement upon a note not payable in bank, for the purpose of transferring the title, thereby enters into a definite contract by which he warrants that the note is a valid instrument, that the maker is liable and able to pay it, and that it will be collectible at maturity by the use of due diligence. *Ward v. Haggard*, 75 Ind. 381; *Mathes v. Shank*, 94 Ind. 501, 505.

This, however, is the contract which the law attributes to the blank endorsement of a promissory note by an assignor. It is not the undertaking of an endorser, nor can we conceive of any principle which would justify a court in attributing such an undertaking to one who signs his name upon the back of a note before its inception in order to give the maker credit with the payee. Such a note, under our statute, is open to all defences by the maker, into whosoever hands it may come, and no good reason can be suggested why the court should hold a person so signing to have made a contract upon which he would be held liable after a successful defence by the maker. Our conclusion, therefore, is, that when a person not the payee of a note, such as that involved in the present case, places his signature on the back of the

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paper at or prior to the time of its inception, without making an express contract defining the nature and extent of his undertaking, he will be held liable according to the rule in *Wells v. Jackson, supra*, upon the original contract, as a surety or joint promisor. This conclusion renders the stipulation in the note waiving notice of non-payment wholly immaterial, as such a stipulation is relevant only to notes governed by the law merchant, and which are capable of strict endorsement.

A surety or joint promisor is bound to take notice of the default of his principal. As to either, notice of non-payment is not necessary. *Fitch v. Citizens Nat'l Bank, supra*; *Scott v. Shirk*, 60 Ind. 160.

The liability of Anderson being presumably that of a surety or joint maker, the stipulation referred to can not affect the contract. *Core v. Wilson*, 40 Ind. 204; *Malbon v. Southard*, 36 Me. 147.

While the pleader in framing his complaint did not proceed upon a strictly correct theory, yet as the facts stated show a *prima facie* cause of action against the appellee, the court erred in sustaining the demurrer to the complaint.

The judgment is therefore reversed, with costs.

Filed Oct. 23, 1888.

VOL. 116.—7

Jarrard v. The State.

No. 14,496.

JARRARD v. THE STATE.

REFORM SCHOOL FOR BOYS.—Act of 1883.—Title Sufficient to Embrace Subject-Matter.—The title of the act of 1883 (Acts of 1883, p. 19), changing the name of the House of Refuge, etc., is sufficiently comprehensive to embrace section 9 of the act, which provides for the commitment of boys to the "Indiana Reform School for Boys."

SAME.—Legislature May Provide for Reformation of Boys.—The Legislature has power to provide for the reformation of boys who are entering upon a career of vice, by prescribing measures for committing them to a reformatory institution. Const., sec. 2, art. 9.

SAME.—Commitment.—Method of Procedure Lawful.—The act of 1883 provides a method for ascertaining by a judicial investigation, in a court of general superior jurisdiction, whether there is cause for taking boys from their parents and placing them in the reform school, and, therefore, it is not an arbitrary proceeding.

SAME.—Complaint.—Sufficiency of Facts.—A complaint by a guardian showing that he can not, because of his advanced age, exercise the control necessary to prevent his ward from becoming an evil member of society, and alleging that the ward is vicious and that he associates late at night with immoral, drunken and dissolute persons, at his own pleasure, is good.

From the Steuben Circuit Court.

D. E. Palmer, F. S. Roby and J. F. Shuman, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

ELLIOTT, J.—The appellant was committed to the Reform School upon the complaint of George Reading.

The act of 1883 is entitled "An act designating a name by which the House of Refuge for the correction and reformation of juvenile offenders shall hereafter be known; providing for the appointment of commissioners, and their compensation, and prescribing their powers and duties; regulating the commitments thereto; and for the more efficient and uniform government of said institution; authorizing the Governor to

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commute the sentences of boys under twenty-one years; declaring how the expenses of maintaining the institution shall be paid; repealing all laws in conflict with this act, and declaring an emergency." Acts of 1883, p. 19.

We have no doubt that the title is sufficiently clear and comprehensive to embrace section 9 of the act, which provides for the commitment of boys to the "Indiana Reform School for Boys." The title of the act contains the clause "regulating commitments thereto," and this certainly embraces section 9. Under our decisions we have little doubt that the title would be sufficient without that clause.

The Legislature had power to enact the statute under examination. The object of the statute is not to punish, but to reform. Boys are sent to the school not as criminals to punishment, but to prevent them from becoming criminals. We do not deem it necessary to enter upon a discussion of this question, for we think it settled in accordance with principle that the Legislature has power to provide for the reformation of boys who are entering upon a career of wickedness, by prescribing measures for committing them to a reformatory institution. *Ex Parte Crouse*, 4 Whart. 9; *Milwaukee Industrial School v. Supervisors, etc.*, 40 Wis. 328; *Roth v. House of Refuge*, 31 Md. 329; *Petition of Ferrier*, 103 Ill. 367; *County of McLean v. Humphreys*, 104 Ill. 378.

But we need not look beyond our own Constitution for authority, for that provides that the Legislature may provide for the establishment of "houses of refuge for the correction and reformation of juvenile offenders." Section 2, article 9.

We do not hold, or mean to hold, that boys can be arbitrarily taken from their parents or guardians and committed to a reformatory school. We sanction no such doctrine. What we here hold, is that where parental restraint is not strong enough to prevent boys from becoming evil members of society, the law may interfere and place them where they may be restrained and reformed. The act before us provides a method for ascertaining by a judicial investigation, in a

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court of general superior jurisdiction, whether there is cause for taking bad boys from the control of parents and placing them in charge of the officers of the commonwealth, and it can not, therefore, be justly said that it arbitrarily takes children from their parents.

The complaint shows that the appellant's guardian, because of his advanced age, can not exercise that control and restraint which is necessary to prevent the appellant from becoming an evil member of society, and it shows, also, that he is vicious, and associates "late at night with immoral, drunken and dissolute persons, at his own pleasure." We agree with appellant's counsel that some of the statements of the complaint are trifling and ridiculous, but there is enough in it to make it good.

Judgment affirmed.

Filed Sept. 19, 1888; petition for a rehearing overruled Nov. 13, 1888.

No. 13,049.

ADAMS v. BUHLER ET AL.

MECHANIC'S LIEN.—*Foreclosure.*—*Complaint.*—A complaint to foreclose a mechanic's lien for labor alleged to have been performed in the erection of a building for a contractor, must show who owned the real estate, or interest to be affected, at the time the building was erected, and that the building was erected in pursuance of a contract, express or implied, with the owner.

From the Adams Circuit Court.

R. S. Peterson and *E. A. Huffman*, for appellant.

D. D. Heller and *P. G. Hooper*, for appellees.

116	100
131	86
116	100
137	689
116	100
167	41

Adams v. Buhler *et al.*

MITCHELL, J.—Buhler & Chronister were awarded a decree in the court below, foreclosing a mechanic's lien against in-lot No. 349, in the Southern addition to the city of Decatur, in Adams county, and also a personal judgment for ninety-three dollars and thirty-two cents against Lemuel D. Adams. From this judgment and decree Adams appealed, and, by an assignment of error duly made, brings in review the sufficiency of the complaint, the material part of which, so far as respects the questions raised, is the following, viz.: "That in the month of April, 1884, one William P. Moon had a contract for building a dwelling-house on the following real estate in Adams county, in the State of Indiana, to wit: In-lot three hundred and forty-nine, in the Southern addition to the city of Decatur, * * which said dwelling-house was to be, and the same afterwards was, constructed on a stone foundation; that the plaintiffs did and performed the stone work of said building, and built said stone foundation-walls by and under a contract made with said Moon; but at and before the time of commencing said work, * * * these plaintiffs notified the defendant Lemuel D. Adams, that they were about to perform and were performing said labor for said William P. Moon, as such contractors," etc.

The other averments in the complaint relate to the completion of the work, the giving of notice by the plaintiffs of their intention to hold a lien, and to the amount which remains due and unpaid, the averments in all those respects being altogether formal and sufficient.

While it is averred that Moon had a contract for the erection of a dwelling-house on a particularly described lot in the city of Decatur, and that the plaintiffs constructed the stone foundation under a contract with Moon, we look into the complaint in vain to ascertain who owned the lot upon which the house was erected, or with whom Moon contracted for the erection of a dwelling upon the lot described. It is quite true, it is averred that the plaintiffs notified Adams that they were about to perform and were performing the

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labor of constructing the foundation for contractor Moon, but as it does not appear from any averment in the complaint that Adams either owned or claimed any interest in the lot upon which the building was erected, or that it was erected by the contractor under a contract with Adams, it is not apparent why the latter should have been notified by the plaintiffs that they were performing labor on the foundation.

Mechanics' liens rest upon contract, express or implied, with the owner or other person whose interest in the real estate it is proposed to bind or affect by the lien, and while persons who perform labor or furnish material for a contractor may secure a lien upon the real estate or building, by notifying the owner and taking the other necessary steps, it is nevertheless essential to the sufficiency of a complaint to foreclose such a lien that it should appear therein who owned the real estate, or the interest to be affected, at the time the building was erected, and that it was erected in pursuance of a contract, express or implied, with such owner. *Lawton v. Case*, 73 Ind. 60; *Neeley v. Searight*, 113 Ind. 316; *City of Crawfordsville v. Brundage*, 57 Ind. 262.

In respect to the above essentials, the complaint in the present case is wholly deficient. It was error, therefore, to overrule the demurrer to the complaint.

Judgment reversed, with costs.

Filed Oct. 13, 1888.

 McCray et al. v. Humes.

No. 13,139.

MCCRAY ET AL. v. HUMES.

116	106
133	174
116	106
134	496
116	103
138	390
139	592
116	103
144	332

PARTITION.—*Statute of Limitations.*—*Pleading.*—The fifteen, and not the twenty years statute of limitations is applicable to a suit in partition, and where an answer sets out the facts showing that the suit was not commenced within fifteen years from the time the right of action accrued, it is good, although it is alleged as a conclusion that the action did not accrue within twenty years.

SAME.—*Adverse Possession.*—*Erroneous Legal Advice.*—Where the owner of an entire estate, acting under erroneous legal advice, asserts title to and conveys only an undivided half thereof, yields exclusive possession to the grantee, and voluntarily leaves other persons, who rely in good faith upon the same advice, in possession of the remaining half under an adverse claim of title, and the adverse possession so held by the grantee and the other persons is continued for more than fifteen years, a suit for partition will be barred.

TRIAL.—*Holding Cause Under Advisement.*—*Delay.*—*Presumption.*—When a judge holds a cause under advisement for more than sixty days without objection, the presumption will be indulged that he had a lawful excuse for the delay.

SPECIAL FINDING.—*Signing.*—*Practice.*—Where the record shows that the name signed to a special finding is not the name of the judge who presided when the finding was filed, the finding is defective, and, if not made a part of the record by an order of court or by a bill of exceptions, it will be considered only as a general finding.

From the Clinton Circuit Court.

J. V. Kent and *J. W. Merritt*, for appellants.

T. H. Palmer and *W. F. Palmer*, for appellee.

NIBLACK, C. J.—This was a suit for partition, commenced on the 7th day of March, 1881, in which William A. McCray and twelve others were plaintiffs, and John D. Humes was defendant.

The complaint alleged that the plaintiffs were the owners of one undivided half of two particularly described tracts of land in the county of Clinton, and that the defendant was the owner of the other undivided half of the same lands.

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The pleadings were very voluminous. Various questions were reserved, or sought to be reserved, upon certain paragraphs of answer, upon a cross-complaint and upon other pleadings, but as the controlling questions involved in this appeal are nearly all more conveniently presented by a special finding of the facts made by the circuit court, we will not formally consider any of the questions reserved upon the pleadings, except upon the sufficiency of the second paragraph of the answer to the complaint, to which our attention has been especially directed. It is sufficient, at the present hearing, to state that the defendant, amongst other things, answered: *First.* In general denial. *Second.* That in the year 1856 he and his only brother and sisters, and one Mary Humes, the ancestor of the plaintiffs, through whom they claim title, were in possession of the real estate described in the complaint as tenants in common; that the said Mary Humes then claimed to be the owner of one undivided half of such real estate under the will of one John McCray, deceased, and that he, the defendant, and his said brother and sisters, claimed to be the owners of the other undivided half by inheritance from their deceased father, Cornelius Humes; that on the 3d day of September, 1856, he, the defendant, purchased from the said Mary Humes all her interest in such real estate, and received from her a conveyance for the same; that he afterwards, at the instance and request of the said Mary Humes, purchased the interests of his said brother and sisters in the same real estate; that on said 3d day of September, 1856, he, the defendant, took exclusive possession of the real estate in controversy as against the said Mary Humes, and continued to hold the same adversely to her, paying the taxes and making valuable improvements thereon, until the 29th day of May, 1867, when she died; that he had ever since continued to hold adverse and exclusive possession as against the plaintiffs, under color of title. Wherefore the cause of action did not accrue within twenty years next before the bringing of this suit.

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A demurrer being first overruled to this second paragraph of answer, issue was joined upon it.

In its special finding the circuit court found the facts substantially as follows:

That on the 23d day of February, 1849, one John McCray was the owner in fee of the lands of which partition was demanded; that Mary Humes, named in the pleadings, was the sister of the said John McCray, and was then the wife of Cornelius Humes, the father of the defendant; that the said John McCray, on said 23d day of February, 1849, executed his last will, devising said real estate to the said Mary Humes and Cornelius Humes in the following words: "I give and bequeath to my sister Mary Humes and Cornelius Humes, her husband, all my estate, both real and personal;" that after the death of the said John McCray, that is to say, on the 5th day of March, 1849, his said last will was duly admitted to probate in said county of Clinton; that Cornelius Humes died intestate on the 14th day of March, 1852; that Mary Humes, who survived her husband, was the second wife of Cornelius Humes, by whom he had no children; that Cornelius Humes left as his children, and only children, by a former marriage, the defendant, John D. Humes, William Humes, Frances P. Byers, Eleanor Shepherd, Caroline Cochran and Sarah Thrush; that after the death of Cornelius Humes, Mary Humes, as his widow, sought legal advice as to her interest in the real estate so devised to her and her husband by her deceased brother, John McCray, as stated, and was thereupon advised by counsel that she had become and was the owner of one undivided half of such real estate, and no more, and that the said children of Cornelius Humes by his former marriage had become and were the owners of the other undivided half; that the said Mary Humes, relying upon the advice so given her, and believing that the same was in accordance with the law as applicable to the existing facts, asserted title thereafter to only one undivided half of the real estate in question; that

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the children of Cornelius Humes, above named, relying in like manner upon the advice given to their said step-mother, thereafter asserted title, in good faith, to the other undivided half of such real estate; that this claim of title by her said step-children, was, in like good faith, fully recognized and assented to by the said Mary Humes; that on the 3d day of September, 1856, Mary Humes entered into a contract with the defendant, John D. Humes, for the sale of her undivided half of said real estate, embracing her supposed entire interest therein, in consideration of the sum of one thousand dollars, and upon the further consideration that he, the said John D. Humes, would support and maintain her during the rest of her life, and accordingly on that day executed a conveyance to him for such undivided one-half of the same; that the said John D. Humes paid said sum of one thousand dollars to the said Mary Humes and supported her the rest of her life; that immediately after the execution of such conveyance the said John D. Humes took exclusive possession and control of the real estate specified in the complaint, and asserted title to one undivided seven-twelfths thereof, the said Mary Humes thereafter disclaiming any further interest in such real estate; that the said Mary Humes, still recognizing and admitting the children of her late husband as the owners of one undivided half of such real estate, advised the said John D. Humes to purchase their interests in the same; that, acting in good faith upon such advice, he accordingly, between the years 1863 and 1872, purchased the interests of his brother and sisters in such real estate, and received from them conveyances therefor; that the said John D. Humes was still in the exclusive possession and control of the real estate in dispute, having made lasting and valuable improvements thereon and having paid the taxes on the same, and having been in such exclusive possession and control since the 3d day of September, 1856, as above stated; that all the occurrences herein set forth were known by the said Mary Humes and the

plaintiffs as they transpired ; that Mary Humes died on the 29th day of May, 1867, and that the plaintiffs were her heirs and only heirs at law.

Upon the facts as thus found the circuit court stated its conclusions to be that the actings and doings of the said John D. Humes, and his brother and sisters, constituted an ouster of Mary Humes from and after the 3d day of September, 1856, at which time the statute of limitations began to run as against her ; that at her death the statute continued to run against the plaintiffs ; that in consequence the cause of action was, before the commencement of this suit, barred by the twenty years statute of limitations.

It was held in the case of *Nutter v. Hawkins*, 93 Ind. 260, that it is the fifteen years statute of limitations which is applicable to a suit in partition, and it is contended that, as the second paragraph of answer in this case set up the twenty years statute of limitations as a defence to the demand for partition, the demurrer ought to have been sustained to that paragraph, relying upon the case referred to, as necessarily leading to that conclusion. In that case the fifteen years statute was pleaded in one paragraph of the answer, which was held to be sufficient upon demurrer, and the twenty years statute in another paragraph, to which a demurrer was sustained. In reviewing that branch of the case, this court came to the conclusion that no error was committed in sustaining the demurrer to the last named paragraph, and in any view the conclusion then reached was substantially correct, as the defendant had the benefit of the fifteen years statute as a defence. Having reference, therefore, to the questions really there decided touching the statute of limitation, that case was not a parallel one with the case at bar.

Under our civil code the facts stated in a pleading determine the rights of a party as well as his remedy. If the facts make a case for a legal remedy, then a legal remedy ought to be applied. If the case made is one calling for equitable relief, then the party becomes entitled to that form of relief.

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The rule that a pleading must state the facts applies as well to an answer as to a complaint. The sufficiency of an answer must be determined by the facts it contains, and not by any mere conclusions of law. 1 Works Practice, sections 342, 351, 590; *Goodall v. Mopley*, 45 Ind. 355.

The greater includes the less, and if, upon the facts alleged, John D. Humes had been in the adverse possession of the real estate for twenty years before the commencement of this suit, he must have been for as much as fifteen years; hence the concluding averment that the cause of action did not accrue within twenty years before the commencement of the suit, amounted to no more than an informal conclusion not affecting the substantial sufficiency of the facts from which it was drawn. The circuit court did not, consequently, err in overruling the demurrer to the paragraph of answer under consideration.

The special finding of the facts is impliedly conceded to be rightfully in the record, and we proceed upon that assumption. Under the will of John McCray, Mary Humes and her husband, Cornelius Humes, became tenants by entirety in the lands devised to them, and on the death of her husband Mary Humes became the owner of the estate in the lands as his survivor. Upon legal advice to the contrary, however, she elected to assert title to only one undivided half, and to recognize the children of her deceased husband as the owners of the other undivided half, and, consequently, as tenants in common with her in the lands. The conveyance by her to John D. Humes of one undivided half carried with it the right of possession of the estate conveyed, and the fair inference is that she was never afterwards in possession of any part of the lands, and that she never thereafter asserted any claim to the right of possession. It was, on the contrary, expressly found, in effect, that immediately after the conveyance John D. Humes took immediate and exclusive possession of the lands, adversely to Mary Humes, under a claim that he had become the owner of one undi-

vided half by the conveyance, and that he and his brother and sisters were the owners by inheritance of the remaining half.

The possession of one person, recognized as a tenant in common with others, is the possession of all. *Bowen v. Preston*, 48 Ind. 367.

This exclusive possession under a claim of title would have been an ouster of Mary Humes if she had really been a tenant in common. But she was not. She had been, as has been shown, the owner of the entire estate, but on account of erroneous advice given her had declined to assert title to more than one-half. She had conveyed one undivided half, all the interest she claimed in the lands, to John D. Humes, and voluntarily left others in the possession of the remaining half under an adverse claim of title, and under circumstances which, if continued long enough, would eventually bar her right to recover such remaining half.

This was not all she did adversely to her claim of title. She afterwards, as has been seen, advised John D. Humes to purchase the claims of title asserted by his brother and sisters, upon the ground that by so doing he would acquire a complete title to all the lands; and this he did accordingly.

Herman on Estoppel, at section 955, on page 1080, says: "A mistake as to the law forms no ground for reforming a contract, yet where a party, acting under a mistake of law or of fact, does acts which mislead the adverse party, he is estopped, as well as if he was not acting under such mistake," and proceeds to give illustrations of the application of that doctrine.

In the next succeeding section he further says, that "There is a vast difference between standing by without taking measures to stop a sale and warning the purchaser, or even answering such questions as he may choose to put, and taking an active part in the transaction, or inducing him to purchase by advice or persuasion. Good faith, generally an excuse in the former case, is insufficient in the latter, for in

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the latter case the owner is nearly, if not quite, in the position of a vendor, and can not rely on the innocence of his assurances as a reason why they should not be made good subsequently."

Applying these general principles to the pertinent facts found by the circuit court, there is much plausibility in the claim that, upon a general view of the facts, Mrs. Humes became estopped from asserting title to any part of the lands in suit. But the point is made that all the facts affecting the question of title were equally well known to both of the parties, and that, consequently, the mistake as to the law applicable to those facts was mutual in that sense which excludes, and to the extent of excluding, an estoppel. As, however, the judgment will have to be affirmed upon other grounds, we need not consider whether, in every view of the case, Mrs. Humes really became estopped from asserting title as against John D. Humes.

Aside from any question of estoppel, this suit was, for the reasons already stated, barred by much more than fifteen years of adverse possession before it was commenced. While, therefore, the conclusions of law drawn by the circuit court were not technically well formulated, no substantial injury was thereby inflicted on the plaintiffs, and they have hence no cause of complaint.

This cause was tried before the Hon. Thomas J. Terhune, who was then the regular judge of the Clinton Circuit Court, on the 24th and 25th days of March, 1882, and having been requested to make a special finding of the facts, the cause was taken under advisement. The special finding was not filed until the 7th day of July, 1885, and no excuse is shown for the delay.

In the meantime an act was passed constituting the 45th judicial circuit, which embraced only Clinton county, and as Judge Terhune did not reside in that county, the Hon. Allen E. Paige had become the judge of the Clinton Circuit Court. Acts of 1883, p. 58. The special finding was filed during the

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June term, 1885, of that court, which the record shows was held by Judge Paige.

The particular proceedings which include the special finding purport to have been held before Judge Paige, but the finding is signed "T. J. Terhune," without any explanation of record as to why it was so signed. Counsel for the appellants assume that Judge Terhune appeared in the circuit court, and, without authority, proceeded to make and to file the special finding, and make the point that on that account, as well as because of the long delay, the special finding is void. In the first place, the assumption that Judge Terhune appeared in the circuit court on that occasion is not sustained by the record. In the next place, the seventh section of the act creating the 45th judicial circuit provided in its legal effect, that all questions at the time pending in the Clinton circuit court before Judge Terhune might thereafter be decided by him. In the third place, when a judge holds a cause under advisement for more than sixty days, without objection or question, the presumption ought to be indulged that he had a lawful excuse for the delay. R. S. 1881, section 551. No objection to either the making or the filing of the special finding seems to have been made at the time it was filed. Consequently the questions sought to be made upon the special finding are not in the record. Besides, a special finding not signed by the judge, nor made a part of the record either by an order of court or by a bill of exceptions, can not be regarded as having been made in compliance with section 551 of the civil code, and hence must be treated only as a general finding. Buskirk Prac. 205; *Conwell v. Clifford*, 45 Ind. 392; *Shane v. Lowry*, 48 Ind. 205; *Bake v. Smiley*, 84 Ind. 212; *McClellan v. Bond*, 92 Ind. 424.

As Judge Paige is made to appear as having presided in the cause when the special finding was made, his name, if any one, ought to have been attached to the special finding, and, upon its face, it is, in that respect, defective in not having been signed by him. Not having been otherwise made

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a part of the record, the special finding can not be considered as any thing more than a general finding in favor of the appellee. As the evidence is also not in the record, there is, therefore, no question before us on the merits of the cause.

The judgment is affirmed, with costs.

Filed Nov. 13, 1888.

116	119
122	210
116	119
151	251

116	112
158	56

116	112
159	213

No. 14,398.

BENHAM v. THE STATE.

MEDICINE AND SURGERY.—*License to Practice.—Misdemeanor.—Indictment.*—

An indictment charging the defendant with practicing medicine without a license, contrary to the act of March 11th, 1885 (Acts of 1885, p. 197), is sufficient as against a motion to quash if it states the offence in the language of the statute, or in terms substantially equivalent thereto.

SAME.—*Burden of Proof.*—In a prosecution under the statute mentioned, the burden is upon the defendant to prove that he was duly licensed to practice medicine.

SAME.—*Holding Out to World as Physician.—Treatment of "Opium Habit."*—

One who styles himself a doctor and holds himself out to the world as a physician, and advertises that he treats and cures persons afflicted with the "opium habit," is required to obtain a license under the act regulating the practice of medicine and surgery, without regard to whether the "opium habit" is a disease or a vice.

From the Wayne Circuit Court

L. C. Abbott, H. C. Fox and J. F. Robbins, for appellant.

L. T. Michener, Attorney General, *R. A. Jackson*, Prosecuting Attorney, and *J. H. Gillett*, for the State.

HOWK, J.—The indictment in this case charged that appellant, Benham, at Wayne county, Indiana, "on the 1st day

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of January, 1887, and thence continually from said 1st day of January, 1887, until the 1st day of September, 1887, did practice medicine without having first procured from the clerk of the circuit court of the said county of Wayne, a license so to do, and he, the said Milton C. Benham, not then and there, nor during any part of said period, having a license so to do according to the laws of the said State, in force at the time, contrary to the form of the statute," etc.

Upon arraignment the appellant, for his plea to such indictment, said that he was not guilty as therein charged. The issues joined were tried by a jury, and a verdict was returned, finding appellant guilty as charged in said indictment, and assessing his punishment at a fine in the sum of ten dollars, and, over his motion for a new trial, judgment was rendered on the verdict.

In this court errors are assigned by appellant which call in question the overruling of his motion to quash the indictment and his motion for a new trial.

It is very clear, from the language of the indictment, the substance of which we have heretofore given, that it was intended to charge appellant therein with the commission of one of the misdemeanors which are defined and their punishment prescribed in an act of the General Assembly of this State, approved April 11th, 1885, entitled "An act regulating the practice of medicine, surgery and obstetrics, providing for the issuing of licenses to practice, defining certain misdemeanors, and providing penalties." Acts of 1885, p. 197.

In section 1 of such act it is provided (omitting the enacting clause), "That it shall be unlawful for any person to practice medicine, surgery or obstetrics in this State without first obtaining a license so to do, as hereinafter provided."

Section 2 of such act then provides that "Any person desiring to practice medicine, surgery or obstetrics in this State, shall procure from the clerk of the circuit court of the county

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wherein he or she desires to practice a license so to do, which license shall be issued to such person only when he or she shall have complied with the * conditions," set forth in such section.

Section 3 makes it a misdemeanor, punishable by fine, for any clerk to issue a license to practice to any person "who has not complied with the requirements of section 2 of this act," and declares that "such license, or one procured by any false affidavit, shall be deemed and held to be void."

In section 4 of the above entitled act it is provided as follows: "Any person who shall practice medicine, surgery or obstetrics in this State without having first procured from the clerk of the circuit court of the county wherein he or she shall so practice a license, as provided in this act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than ten dollars nor more than two hundred dollars: *Provided*, That this act shall not be deemed to prohibit women from practicing obstetrics, and such midwives are hereby expressly exempted from its provisions."

In discussing the alleged error of the court below in overruling appellant's motion to quash the indictment herein, his learned counsel insist very earnestly and at much length that such indictment is clearly bad, in that it "does not state the offence with sufficient certainty." This is the *fourth* statutory cause, for which "The defendant may move to quash the indictment or information when it appears upon the face thereof." Section 1759, R. S. 1881.

If the objection of appellant's counsel to the indictment herein had been well taken, it would have been error, no doubt, under our decisions, to have overruled the motion to quash. *Dyer v. State*, 85 Ind. 525; *Murphy v. State*, 106 Ind. 96; *Trout v. State*, 107 Ind. 578; *Trout v. State*, 111 Ind. 499.

We are of opinion, however, that the indictment in this case is not open to the objection that it does not state the of-

fence charged with sufficient certainty. The offence charged against appellant herein is purely a statutory offence—that is, it was created and defined and its punishment prescribed by the provisions heretofore quoted of the above entitled act of April 11th, 1885. In such a case, it has been held by this court, as a general rule, that an indictment or information will be sufficient to withstand a motion to quash, if it charge the offence in the language of the statute, or in terms substantially equivalent thereto. *Howard v. State*, 87 Ind. 68; *State v. Miller*, 98 Ind. 70; *Ritter v. State*, 111 Ind. 324; *Trout v. State*, *supra*.

In the case under consideration it is conceded on behalf of appellant that the offence charged is a statutory offence, and that the indictment charges him with such offence substantially in the language of the statute. In *Eastman v. State*, 109 Ind. 278, the appellant was prosecuted, as we may infer from the opinion of the court, as is the defendant in the case in hand, for unlawfully practicing medicine without having first procured from the proper clerk a license so to do. In the case cited the sufficiency of the charge seems to have been challenged, and, upon this point, the court there said: "The offence is charged in the language of the statute, and this is sufficient. *State v. Miller*, 98 Ind. 70, and cases cited; *Graeter v. State*, 105 Ind. 271; *Antle v. State*, 6 Texas App. 202."

Our conclusion is, that, in the case we are now considering, the motion to quash the indictment was correctly overruled.

Under the alleged error of the court in overruling appellant's motion for a new trial, his counsel first insist that the court erred in giving the jury, of its own motion, the following instruction, namely: "The defendant is presumed to be innocent, and his guilt must be proven beyond a reasonable doubt. To warrant a verdict of guilty, the State must prove beyond a reasonable doubt that the defendant, Milton C. Benham, at Wayne county, State of Indiana, during some period within two years prior to the filing of this indictment,

to wit, September 10th, 1882, practiced medicine without having first procured from the clerk of the circuit court of said county a license so to do. The indictment alleges that the defendant engaged in the practice of medicine without a license. The burden of proving that the defendant was duly licensed to practice medicine is upon the defendant." Appellant's counsel have pointed out no substantial objection to the instruction quoted, and we can see none. It contains, we think, a correct statement of the law applicable to such a case as this, and places the burden of proof where it properly belongs. The instruction is applicable to the case made by the evidence in the record, and affords no cause whatever for a new trial, and no sufficient ground for the reversal of the judgment below.

The important and controlling questions in this case are presented by the alleged insufficiency of the evidence in the record to sustain the verdict of the jury. Is there evidence in the record which authorized the jury to find that appellant, within the period of the statute of limitations, practiced medicine at Wayne county, Indiana, as charged in the indictment herein, without having first procured from the clerk of the Wayne Circuit Court a license so to do? In their brief of this cause, appellant's learned counsel have ably and elaborately discussed the question as to whether or not the "opium habit," so called, is a disease or a vice. In the view we shall take of the evidence in this case, we do not find it necessary that we should consider and decide the question discussed by counsel. It is a question of fact and not of law, and, in some sense, it may be said to be involved in or presented by the record of this cause. But whether the "opium habit" be regarded as a disease or not, we are of opinion that evidence was introduced on the trial of this cause which authorized the jury to find that, in his treatment of such habit and of his unfortunate patients who were morbidly addicted thereto, appellant held himself out to the world as a physician, and practiced medicine within the

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meaning of our statute regulating the practice of medicine, without having first procured from the clerk of the proper court a license so to do. He issued circulars, signed "Dr. M. C. Benham," in which he claimed that his "treatment" of his "patients" would effect a "complete cure" of the opium habit. He also issued a number of letters from former patients, addressed to him as "Doctor," testifying to the efficacy and success of his "treatment" of the opium habit. The caption of bills and receipts, given by him to his patients, was "Office of Dr. M. C. Benham, No. 24 South 9th street, Richmond, Ind.," and clearly indicated that he claimed to be and held himself out as a practicing physician, in Wayne county in this State.

There is evidence in the record of this cause, we think, which fairly sustains the verdict of the jury on every material point. In such a case, it is now firmly settled by our decisions that the verdict will not be disturbed here, nor will the judgment below be reversed, even in a criminal cause, upon what might seem to be the weight of the evidence. *Hudson v. State*, 107 Ind. 372; *Ritter v. State*, 111 Ind. 324; *Ard v. State*, 114 Ind. 542.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Filed Nov. 9, 1888.

Hankey v. Downey.

116	118
116	508
116	118
142	156

No. 14,424.

HANKEY v. DOWNEY.

PATENT-RIGHT.—*Sale of.*—*Statute Regulating.*—*Validity of.*—The statute of this State (sections 6054, 6055, R. S. 1881), requiring vendors of patent-rights to file with the county clerk copies of the letters-patent, and to make an affidavit that the letters are genuine, and requiring, also, that promissory notes given for such rights shall contain the words "given for a patent-right," is valid.

SAME.—*Statute Applies to Intangible Right.*—*Articles Manufactured Under Letters-Patent not Affected.*—The statute mentioned applies only to the intangible right evidenced by the patent; it has no application to the tangible article manufactured under letters-patent.

From the Howard Circuit Court.

J. C. Blacklidge, W. E. Blacklidge and B. C. Moon, for appellant.

J. O'Brien and C. C. Shirley, for appellee.

ELLIOTT, J.—Our decisions affirm that the statute requiring vendors of rights secured by letters-patent to file with the county clerk copies of the letters, and to make an affidavit that the letters are genuine, and requiring, also, that promissory notes given for such rights shall contain the words "given for a patent-right," is valid. *Fry v. State*, 63 Ind. 552; *Toledo Agricultural Works v. Work*, 70 Ind. 253; *Brechbill v. Randall*, 102 Ind. 528; *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1; *Hockett v. State*, 105 Ind. 250; *New v. Walker*, 108 Ind. 365.

From these decisions we do not depart, but we do not regard them as decisive of this case, for here the principal question is whether the statute applies to an article manufactured under a patent.

Our decisions, and those of other courts, make a distinction between the tangible thing manufactured under a patent and the intangible right evidenced by the patent. There is, in

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our judgment, a reason, and a very satisfactory one, for this distinction.

In *New v. Walker*, *supra*, we affirmed that the statute was valid because it provided for the protection of the citizens by making provisions applicable to property of a unique character, for property of an intangible nature secured by an exercise of a governmental power of a peculiar kind, and operative upon only a single class of rights. The decisions in *State v. Peck*, 25 Ohio St. 26, and *Tod v. Wick*, 36 Ohio St. 370, declare that a statute similar to ours is valid, but that it does not apply to articles manufactured under a patent. The distinction between the tangible thing and the intangible right is clearly established and maintained in very able opinions. Other cases declare a like doctrine. *Webber v. Virginia*, 103 U. S. 344; *Stephens v. Cady*, 14 How. 528; *Stevens v. Gladding*, 17 How. 447; *Patterson v. Kentucky*, 97 U. S. 501; *Palmer v. State*, 39 Ohio St. 236; *Woolen v. Banker*, 17 Alb. L. J. 72.

In holding, as we have held, and as other courts have held, that the Legislature has a right to make provision for securing and recording evidence of patents and for regulating the subject of promissory notes, we did not hold, nor did these other courts hold, that the States might discriminate against patented property. *New v. Walker*, *supra*, and cases cited; *State v. Peck*, *supra*; *Tod v. Wick*, *supra*; *Horstman v. Zimmerman*, 4 Atl. R. 171; *Haskell v. Jones*, 86 Pa. St. 173.

On the contrary, the difference between the article manufactured and the right secured by the patent is clearly recognized. We need not decide whether it would be within the power of the State Legislature to discriminate against articles manufactured under a patent, for all that we need decide, and all that we have decided on this point is, that it may reasonably regulate the transfer of intangible rights of a peculiar nature. It may be that the States can not discriminate against property manufactured under a patent, but they may enact regulations respecting its use, sale and transfer, if it is treated

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as property of a similar class is treated. *Hockett v. State, supra*. But we need not further pursue this line of discussion, for, as we have already said, the controlling question by which we are faced is as to the meaning of our statute, and not as to the power of the Legislature to enact it.

The words of the statute are: "It shall be unlawful for any person to sell or barter, or to offer to sell or barter, any patent-right, or any right which such person shall allege to be a patent-right, in any county within this State, without first filing with the clerk of the court of such county copies of the letters-patent, duly authenticated, and, at the same time, swearing or affirming to an affidavit, before such clerk, that such letters-patent are genuine, and have not been revoked or annulled, and that he has full authority to sell or barter the right so patented." R. S. 1881, section 6054.

In referring to promissory notes executed for a patent-right, the words employed are "patent-right, or right claimed to be a patent-right." As there is a distinction between the intangible right and the tangible thing manufactured under the right, and as the statute uses words embracing only the intangible right, it can not be extended by construction to tangible articles manufactured under letters-patent. The words used in the statute have a clear and well defined meaning, and that meaning we must ascribe to them. If, however, we were compelled to look beyond the words, we should not hesitate to hold that it was not the intention of the Legislature to compel every merchant or dealer who sells articles manufactured under a patent to perform the acts prescribed by the statute, but that the intention was to compel the performance of those acts by vendors of the intangible rights secured by the letters-patent. This intention is quite apparent when the general scope and purpose of the statute are given consideration, but, as we have said, the words themselves are unequivocal and clear.

Judgment reversed.

Filed Oct. 13, 1888; motion to make mandate more specific overruled Nov. 8, 1888.

The Town of Knightstown v. Musgrove.

No. 13,763.

THE TOWN OF KNIGHTSTOWN v. MUSGROVE.

NEGLIGENCE.—Town.—Obstruction in Street. — Contributory Negligence of Third Person.—The contributory negligence of the driver and manager of a carriage will not defeat an action by one who was passively riding with him upon invitation, for personal injuries caused by the negligence of town authorities in leaving a dangerous obstruction in the street, without proper safeguards, if the person injured be himself without fault.

SAME.—General Rule.—One who sustains an injury without any fault of his own, or of some one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his acts, may look for compensation to any other person whose neglect of duty caused the injury, although the negligence of a third person, with whom he did not sustain the above relations, may have contributed thereto.

SAME.—When Negligence of Third Person is a Defence.—Before the concurrent negligence of a third person can be interposed to shield another, whose negligence has caused an injury to one who was without fault, it must appear that the injured person and the one whose negligence contributed to the injury sustained such a relation to each other, in respect to the matter then in progress, that in contemplation of law the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured.

From the Henry Circuit Court.

L. P. Newby, J. H. Mellett and E. H. Bundy, for appellant.

J. L. Shelton, W. Woods, B. F. Davis, W. H. Martz, C. S. Hernly and S. H. Brown, for appellee.

MITCHELL, J.—Lucinda Musgrove sued the town of Knightstown to recover damages for injuries alleged to have been sustained by her on the 1st day of July, 1886, without any fault on her part, while riding along a public street in the above mentioned town, in which there was a dangerous unguarded obstruction.

There was a trial by jury and a verdict and judgment in favor of the plaintiff for seven hundred dollars.

116	121
120	206
122	42
123	426
116	121
125	223
116	121
128	99
116	121
120	143
116	121
124	408
116	121
146	606
116	121
150	514
150	521

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The evidence tended to show that two or more loads of gravel had been hauled upon the street, by the direction of the authorities, late in the evening of the day on which the accident happened, and that they had been left in such manner as to make a gravel heap eighteen or twenty inches in height, and that there were no lights or other arrangements to prevent persons lawfully using the street from running upon the obstruction caused by the gravel. The plaintiff and her niece, a girl some sixteen years old, while riding in the evening after dark, for recreation, upon the invitation of a Mr. Hunter, were driven upon the obstruction thus left, and thrown out of the carriage, which was overturned. Hunter was the owner of the horse and vehicle, and had them in his charge at the time of the accident.

At the trial the defendant offered to prove that Hunter had been at the place where the gravel was unloaded, on the evening of the accident, and that he talked with the men who hauled it about leaving it there in the condition in which it was left. The object of the testimony was to show contributory negligence on the part of Hunter, with a view of insisting that the plaintiff was so identified with him as that his negligence should be imputed to her. The testimony having relation to that subject was all excluded and it is now urged that the judgment ought to be reversed on account of this ruling. It is not claimed that the plaintiff was herself guilty of any default, nor was it proposed to show that she knew or had any reason to suspect that Hunter was not a prudent, safe and competent driver, but, assuming that the excluded evidence would have shown that Hunter was negligent, the claim is, that his neglect ought to be imputed to the plaintiff, and that her right of recovery should have been thereby defeated, notwithstanding the neglect of the defendant. *Thorogood v. Bryan*, 8 C. B. 115, is perhaps the leading case in support of the doctrine upon which a reversal is claimed. It appeared in that case that a passenger who had alighted from an omnibus was run down and

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fatally injured by an omnibus belonging to another line, which came up at the moment. The jury were instructed to the effect that if they should find that the negligence of the driver of the vehicle in which the deceased was a passenger, in not drawing up to the curb in such manner as to afford him a safe place to alight, had contributed to the injury, their verdict must be for the defendant, although the driver of the omnibus owned by the latter was also guilty of negligence. The doctrine of this case, and of those which follow it, ascribe to the passenger the negligence of a driver over whom the passenger has no control. The authority of the case has been greatly impaired in England by criticisms upon it in later cases, and the courts of this country, with but one or two exceptions, now hold the principles upon which it rests wholly indefensible. *Little v. Hackett*, 116 U. S. 366; *Wabash, etc., R. W. Co. v. Shacklet*, 105 Ill. 364 (44 Am. R. 791); *Carlisle v. Brisbane*, 113 Pa. St. 544 (57 Am. R. 483, and note); *Street R. W. Co. v. Eadie*, 43 Ohio St. 91; *Philadelphia, etc., R. R. Co. v. Hogeland*, 66 Md. 149 (7 Atl. R. 105); *Cuddy v. Horn*, 46 Mich. 596; *Battishill v. Humphery* (Mich.), 31 N. W. R. 894; *Nisbet v. Town of Garver* (Iowa), 39 N. W. R. 516; *Follman v. City of Mankato*, 35 Minn. 522; *New York, etc., R. R. Co. v. Steinbrenner*, 47 N. J. L. 161; *Robinson v. New York, etc., R. R. Co.*, 66 N. Y. 11; *Dyer v. Erie R. W. Co.*, 71 N. Y. 228; *Masterson v. New York, etc., R. R. Co.*, 84 N. Y. 247.

Without entering upon a review of the cases, it is sufficient to say the general principle deducible from the decisions is, that one who sustains an injury without any fault or negligence of his own, or of some one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his negligent conduct, may look to any other person for compensation whose neglect of duty occasioned the injury, even though the negligence of some third person with whom the

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injured person was not identified as above may have contributed thereto. Beach Con. Neg., section 33.

Before the concurrent negligence of a third person can be interposed to shield another whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other, in respect to the matter then in progress, as that in contemplation of law the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured. Until such agency or identity of interest or purpose appears, there is no sound principle upon which it can be held that one who is himself blameless, and is yet injured by the concurrent wrong of two persons, shall not have his remedy against one who neglected a positive duty which the law enjoined upon him.

In a case like the present, where one accepts the invitation of another to ride in his carriage, thereby becoming in effect his comparatively passive guest, without any authority to direct or control the conduct or movements of the driver, or without reason to suspect his prudence or competency to drive in a careful and skilful manner, there is no reason why the want of care of the latter should be imputed to the former, so as to deprive him of the right to compensation from one whose neglect of duty has resulted in his injury.

As was in effect said in *Brannen v. Kokomo, etc., Co.*, 115 Ind. 115, this court has heretofore adopted and followed the line of decisions which hold that in such a case negligence will not be so imputed. *Town of Albion v. Hetrick*, 90 Ind. 545; *Terre Haute, etc., R. R. Co. v. McMurray*, 98 Ind. 358 (369).

In *Brannen v. Kokomo, etc., Co.*, *supra*, the conclusions above stated were distinctly recognized. It appeared, however, in that case that the owner and driver of a team, in whose wagon the plaintiff, with others, was seated, attempted while in a state of intoxication to run the toll-gate without

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paying toll. Inasmuch as it did not appear but that the plaintiff knew of, and acquiesced in the driver's purpose to commit the contemplated wrong, it was properly held, within the conclusions above declared, that he was so co-operating with the driver as that in the absence of exculpatory evidence the act of the driver was the act of the plaintiff. The principle which controlled in the decision of that case is not applicable here. In some jurisdictions attempts are sometimes made to distinguish between the rights of one who is injured while being carried as a passenger in a public conveyance, and when riding in a private conveyance. There does not seem to be any substantial ground upon which to rest such a distinction. The inquiry in either case must be, was the relation of the person whose negligence is sought to be attributed to the person injured such that the latter had at least an equal right to direct and control the movements of the conveyance, or that he would have been jointly liable to a third person for the consequences of the negligent conduct of the former?

The plaintiff was lawfully using the street at the time she suffered the injury. It was the duty of the corporation to keep the street in such condition that persons using it properly, who were not so deficient in reasonable prudence and ordinary care as to bring injury upon themselves, could do so without peril.

It should be observed that the doctrine of imputable negligence as applicable to the relation of parent and child, and other kindred relations, which has been the subject of much recent discussion, is not involved in the facts of the present case, although the conclusions reached might seem to cover cases involving that relation, especially where the action is by an infant. That question is, however, to be considered open for examination when it arises.

The evidence tends to sustain the verdict.

The judgment is therefore affirmed, with costs.

Filed Nov. 9, 1888.

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116	126
133	204

116	126
152	139

No. 13,425.

**THE CHICAGO AND ATLANTIC RAILWAY COMPANY v.
BARNES.**

SPECIAL FINDING.—*Correct Ultimate Conclusion of Law.*—*Erroneous Intermediate Conclusion not Available for Reversal of Judgment.*—If the ultimate conclusion of the trial court is right, upon the facts specially found, an intermediate error in stating a conclusion of law, not of controlling force, will not authorize the reversal of the judgment.

RAILROAD.—*Fence.*—*Agreement to Maintain.*—*Farm Crossing.*—*Liability for Animals Killed.*—Where a railroad company, in consideration of the grant of a right of way through a farm, agrees to erect and maintain a safe private crossing and a secure fence, it is bound to pay for animals killed by its trains where they enter upon the track through the fault of the company in failing to fence the crossing in accordance with the contract.

SAME.—*Leaving Crossing Gates Open.*—*Burden of Proof.*—If the gates at the crossing are left open by the land-owner, or by a wrong-doer other than the railroad company, that is a matter of defence.

From the Porter Circuit Court.

J. S. Slick and *W. O. Johnson*, for appellant.

W. Johnston, for appellee.

ELLIOTT, J.—A mare and a bull belonging to the appellee were struck and killed by one of the appellant's locomotives on the 2d day of May, 1884. The facts which control the controversy are thus stated in the special finding: "The animals entered on the right of way and track of the defendant at a private road crossing made by the defendant to enable the plaintiff to pass to and from his fields, situate immediately north and south of the defendant's right of way, which the plaintiff had long used. The defendant's road runs east and west through plaintiff's farm where the crossing was made. The defendant obtained its right of way by conveyance from the plaintiff. As part consideration for the execution of the deed it was stipulated therein as follows: 'Said

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company agrees to build and maintain a good and sufficient fence upon both sides of the right of way, and farm crossings, with cattle-guards for the width of space of three rods on each side of the center line of said railroad, as now located, making six rods in width, and for the distance between the limits of said tracks.' The defendant accepted the deed, constructed its road, and built a substantial fence on both sides of the right of way through plaintiff's land, and also built substantial gates at the private crossing in the line of fences, but has failed and neglected to construct the cattle-guards on the sides of the crossing. Continuously for two months or more before the killing of said animals the gate fastenings were insufficient, and did not securely hold the gates in place, and did not constitute a sufficient fence to keep cattle and horses from entering thereat upon the defendant's right of way and track. This fact was well known to both plaintiff and defendant for a long time prior to the date of the killing of said animals, to wit, for the period of two months or more. Neither the plaintiff nor the defendant made any effort to provide the gates with proper or sufficient fastenings."

Immediately before the plaintiff's animals were killed they were feeding on his pasture on the north side of the road, and passed from that field through an open gate at the private crossing on to the defendant's track.

The question in this case is whether the trial court did right in awarding a recovery, for, if the facts entitled the appellee to a recovery, then the judgment will not be reversed, although some one of the conclusions of law stated by the court may be erroneous. If the ultimate conclusion of the court is right upon the facts, an intermediate error in stating a conclusion of law which is not of controlling force will not authorize a reversal. *Krug v. Davis*, 101 Ind. 75; *Bothwell v. Millikan*, 104 Ind. 162.

Where an erroneous conclusion of law leads to an erroneous judgment, it will, of course, require this court to set aside

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that judgment; but it is manifest that an intermediate error, which does not materially affect the final conclusion, can not be sufficient cause for reversing the judgment. We do not, therefore, deem it necessary to inquire whether the trial court was, or was not, right in stating as one of the conclusions of law, that it was the primary duty of the appellant to build and maintain secure fences, and that the "contract only afforded an additional assurance that the duty which the law enjoined would be performed."

There was a valid contract between the parties, founded upon a valuable consideration, and designed to accomplish a designated object. Contracts are, as a familiar elementary rule declares, to be construed by the light of attendant circumstances and with reference to the object it was the intention of the parties to accomplish. *Indiana, etc., R. W. Co. v. Adamson*, 114 Ind. 282.

It is quite clear that the construction given the contract by the trial court is such as this rule commands. It imposed upon the appellant the obligation of providing a safe private crossing, and of erecting and maintaining a secure fence. For a breach of the duty created by the contract the appellee had a right of action. Whether the action could be maintained if there were no such contract is not the question; the question is, was there a breach of the contract, and did loss result to the plaintiff from that breach?

It is argued that the measure of damages is not the value of cattle killed, but the cost of erecting and maintaining a secure fence. The principle declared in *Louisville, etc., R. W. Co. v. Sumner*, 106 Ind. 55, rules here, and decides this question against the appellant.

Where a railroad company obtains a right of way through a farm, and in consideration of the grant agrees to erect and maintain a secure fence, it is bound to pay for animals killed by its trains, in cases where the animals enter upon the track through the fault of the company in failing to fence the crossing in accordance with the terms of the contract. *Don-*

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ald v. St. Louis, etc., R. W. Co., 44 Iowa, 157; *Smith v. Chicago, etc., R. R. Co.*, 38 Iowa, 518; *Fernow v. Dubuque, etc., R. R. Co.*, 22 Iowa, 528; *Chicago, etc., R. R. Co. v. Ward*, 16 Ill. 522; *Conger v. Chicago, etc., R. R. Co.*, 15 Ill. 366; *Joliet, etc., R. R. Co. v. Jones*, 20 Ill. 222; *Poler v. New York, etc., R. R. Co.*, 16 N. Y. 476; *Hull v. Chicago, etc., R. R. Co.*, 20 Am. & Eng. R. R. Cases, 341; *Raridon v. Central Iowa R. R. Co.*, 19 Am. & Eng. R. R. Cases, 615.

The facts stated make a *prima facie* case for the appellee, for they show a valid contract to make a secure fence, a breach of this contract, and that the animals got upon the track because the fence was not such as it was appellant's duty to erect and maintain. If it had appeared that the gates were left open by the appellee, or by some wrong-doer other than the appellant, we should, perhaps, be required to hold that there was no liability; but no such facts appear. We do not believe it was necessary for the special finding to state that the gate was not left open by the appellee, or by a wrong-doer, for certainly the plaintiff was not bound to prove these facts in order to make out his case. He was bound to prove the contract, the appellant's breach, and loss resulting from it, but he was not bound to anticipate and overthrow defences that might have availed the appellant.

Judgment affirmed.

Filed Nov. 10, 1888.

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Grimsley v. The State, *ex rel.* Cohen *et al.*

116	130
124	195
127	89

No. 13,455.

GRIMSLEY v. THE STATE, EX REL. COHEN ET AL.

TOWNSHIP TRUSTEE.—*Void Promissory Notes.—Action Upon Official Bond.*—

Promissory notes illegally executed by a township trustee are void in their inception. Holders are bound to know this as matter of law, and they can not maintain an action upon the official bond of the trustee.

From the Daviess Circuit Court.

J. Baker and *A. J. Padgett*, for appellant.

W. R. Gardiner and *S. H. Taylor*, for appellees.

ELLIOTT, J.—The relators sought and secured a recovery against the appellant upon his official bond as township trustee. It was alleged, among other things, that he had wrongfully and illegally executed promissory notes of the township to R. B. Pollard.

The relators base their claim to a recovery on the fact that they are good-faith purchasers of the notes, and were misled by the wrongful acts of the township trustee. The claim is without foundation. The notes were void in their inception, and this the relators were bound to know as matter of law. They can not, therefore, have any cause of action upon the official bond. Whether they may maintain a different action we do not decide. The question is fully discussed in *State, ex rel., v. Hawes*, 112 Ind. 323, and it is unnecessary for us to again discuss it.

Judgment reversed, for the reason that the complaint does not state a cause of action.

Filed Sept. 22, 1888.

 Downard v. Hadley et al.

No. 13,331.

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120	8

DOWNARD v. HADLEY ET AL.

ATTORNEY AND CLIENT.—*Employment to Perfect Title to Land.*—*Title Purchased by Attorney Enures to Benefit of Client.*—An attorney, who is employed to perfect or defend a particular title to land, can not, either during the continuance of the employment or after its termination, without disclosing the facts to, and obtaining the consent of, his client, avail himself of information acquired, or which it was his duty to acquire, while in that relation, and purchase an outstanding title for himself, and set it up in hostility to that which he was employed to perfect or defend; on the contrary, a title so acquired enures to the benefit of the client or his vendee.

SAME.—*Constructive Trust.*—Where one, by means of a confidential relation, obtains title under such circumstances that it would be a fraud upon another to permit the title thus obtained to be held against, or to the injury of, the one whose confidence has been abused, a constructive trust arises in favor of the person in whose name the title should have been taken.

From the Hendricks Circuit Court.

T. J. Cofer and *N. M. Taylor*, for appellant.

L. M. Campbell, for appellees.

MITCHELL, J.—James A. Downard commenced this action against Henry Hadley to recover the possession of forty acres of land in Hendricks county. After the suit had been pending for a time, and various motions, answers and demurrers had been filed, Virinda Keeney and Thomas Keeney were admitted upon their own application as parties defendants. They, in conjunction with the defendant Hadley, set up facts tending to show that the appellant had obtained the title to the land in dispute by means of fraudulent representations, and in violation of his professional duty as an attorney, and they asked that the conveyance so obtained from the Keeneys should enure to the benefit of the defendant Hadley.

The court found the facts specially, and stated its conclu-

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sions of law thereon, upon which a judgment in favor of the defendant Hadley was rendered. To reverse the judgment upon the facts so found this appeal is prosecuted.

It appears that the land in dispute was inherited by Virinda Mattox from her deceased husband, Robert Mattox, who died intestate, and without children or other heirs than his widow, in the year 1865. The widow intermarried with Thomas Keeney in August, 1866, and in November of the same year, her husband joining, she conveyed the land by warranty deed to James Lewis, who paid her its full value. After several mesne conveyances, Washington Riggins acquired the title by warranty deed, and being about to sell the land in dispute, together with an eighty-acre tract which he owned adjoining, he employed the appellant and his partner, who were attorneys at law, and engaged in the business of preparing abstracts of title to real estate, to make an abstract of the title to both tracts, and to take some proceedings in court in order to perfect the title to the eighty-acre tract. An abstract was prepared accordingly, and the contemplated proceedings taken, for which service the appellant and his partner received the sum of thirty-five dollars.

Upon the abstract so prepared, Riggins bargained and sold both tracts of land to the defendant Hadley, and executed to him a warranty deed therefor, but before accepting the deed the latter submitted the abstract above mentioned to his attorney, who informed him and his grantor, Riggins, that the title to the forty-acre tract was defective, owing to the fact that it had been obtained by Virinda Keeney in virtue of her previous marriage with Robert Mattox, and that she had no power to alienate the same at the time she conveyed to James Lewis in 1866. The defendant and his grantor were, however, further informed by the attorney of Hadley, that the statute had been so changed since the conveyance to Lewis that a quitclaim deed from Mrs. Keeney and her husband to Hadley would make the title perfect. Upon the assurance that he would obtain such a conveyance perfecting the title,

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Hadley completed the purchase, accepted Riggins warranty deed, and went into possession. At the time the appellant prepared the abstract he observed the apparent break in the title from Robert Mattox to Virinda Keeney, and about the time the deed was delivered from Riggins to Hadley, which was on the 23d day of December, 1883, he ascertained the cause of the apparent break, and also learned that a conveyance made under the circumstances existing at the time of that made by Virinda and Thomas Keeney to James Lewis was void. He also learned that Mrs. Keeney and her husband resided in the State of Iowa, and thereupon immediately wrote and telegraphed an attorney in that State, and caused him to represent to the Keeneys that the appellant desired them to make a deed to him in order to supply an apparent omission in the title. The Keeneys made no claim to the land, but asserted that there was about sixteen dollars due them on account of unpaid purchase-money, and consented to make a deed as requested upon being paid that sum. The appellant paid the sum claimed, and by means of the representations above mentioned, and others, obtained a warranty deed for the forty-acre tract, which the court finds was worth fourteen hundred dollars.

Relying upon the title thus acquired, he brought this suit to eject Hadley, who went into possession and claimed title under the warranty deed from Washington Riggins.

It is insisted on the appellants behalf that inasmuch as Mrs. Keeney was under a statutory disability, which deprived her of the power to alienate the land in controversy at the time she conveyed to James Lewis, no equity arose out of the transaction with Lewis, or in favor of any subsequent grantee through him, and that the appellant therefore took an absolute title under the deed obtained by him in the manner disclosed, free from any resulting or implied trust in favor of Hadley, or any one else, and that he was hence entitled to recover the land.

We are not disposed to consider the effect of the deed to

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Lewis, but concede, for the purposes of this case, that it was absolutely void, nor is the argument involving resulting and implied trusts germane to the case. Conceding all that is said upon these subjects, it is certain, nevertheless, that until it can be maintained that the legal profession is absolved from those obligations of fidelity to which its members are severally and solemnly pledged, or until it can be shown that considerations of rectitude and good faith are no longer to be observed between attorney and client, the transaction disclosed can not receive the approbation of a correct mind, much less judicial sanction in a court of justice.

The rule is inflexible, and must be maintained without any deviation, that an attorney who is employed to perfect or defend a particular title to land, can not, either during the continuance of that employment or after its termination, without disclosing the facts to, and obtaining the consent of, his client, avail himself of information acquired, or which it was his duty to acquire, while in that relation, and purchase an outstanding title for himself, and set it up in hostility to that which he was employed to perfect or defend. *Henry v. Raiman*, 25 Pa. St. 354; *Smith v. Brotherline*, 62 Pa. St. 461.

The obligation of fidelity which an attorney owes to his client is a continuing one, so far as respects any matter which has once been professionally committed to the attorney's confidence, and when the matter involved is the title to land, good faith and public policy require that any existing adverse title which the latter may thereafter purchase, shall be deemed to enure to the benefit of his client, or his, the client's, vendee.

Constructive trusts arise when one by, means of a confidential relation, obtains a legal title under such circumstances as that, according to the rules of equity and good conscience, it would be a fraud upon another to permit a title thus obtained to be held against or to the injury of one whose confidence has been abused. 1 Perry Trusts, section 166.

In such a case, equity, treating that as done which ought

to have been done, will hold him who took the title in violation of his duty, as a trustee by construction or compulsion of law, for the other in whose name the title should have been taken.

It was the appellant's duty, when he ascertained the defect in the title which he was employed to examine and perfect, to inform his client, and to take immediate and diligent steps to perfect it for the latter's benefit. Instead of that the court finds that he obtained an outstanding title in a manner we do not care to characterize, and immediately assailed the very title which he had been employed to perfect, and which his client had warranted to Hadley. The present case finds its exact parallel and counterpart in *Baker v. Humphrey*, 101 U. S. 494, in which a conclusion similar to that arrived at here was reached.

It is suggested in the brief that the appellant was entitled to be reimbursed the amount paid for the deed obtained by him from the Keeneys. Perhaps that is true, but he made no such claim in the court below. He fought the case to the end upon the theory that he was entitled to recover the land from his client's vendee. We are unable to discover upon the record that he even asked the court below to modify its judgment, so as to order the repayment to him of the sixteen dollars paid. He chose to stand upon his legal right strictly, and so it must be. Under the circumstances we can not now reverse what we esteem to have been otherwise a proper judgment.

The judgment is therefore affirmed, with costs.

Filed Nov. 10, 1888.

Burkham v. Hayes, Administrator.

No. 13,192.

116 136
130 183**BURKHAM v. HAYES, ADMINISTRATOR.**

FAMILY SETTLEMENT.—*Decedent's Estate.*—*Claims.*—*Payment.*—Where one devisee, who holds enforceable claims against the testator's estate, enters into a contract with another devisee, upon whose land the claims are a burden, in pursuance of which the latter pays to the former full consideration for the claims, the settlement is valid, in the absence of fraud or mistake, and the claims involved will be deemed extinguished.

From the Dearborn Circuit Court.

J. K. Thompson, for appellant.

N. S. Givan and *W. N. Hauck*, for appellee.

ELLIOTT, J.—The appellee filed his final report as administrator *de bonis non* of the estate of Enoch Hayes, deceased, on the 5th day of January, 1886. A time was fixed for hearing, and due notice given. After the report was filed the administrator added to it the claims against the estate held by the appellant. The allowance of these claims was successfully opposed, and Burkham appeals from the judgment against him.

Enoch Hayes died testate. He devised land to his wife, Anna Hayes, and to his mother, Mary A. Sykes. The will contained this clause: "I will that in case there is not money enough in the hands of the executors of my father's will to pay all of my just debts, I then desire that the property herein devised to my wife, Anna, and to my mother, Mary A. Sykes, shall be held in equal proportions to pay the same, and to this end I make a charge upon my estate so devised to perform the same."

Anna Hayes subsequently married Samuel Cooper. Henry L. Cooper qualified as executor of the will, and assumed the duties of the trust in Hamilton county, Ohio, and in Dearborn county, in this State; John Billingsley was surety on

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Cooper's bond; Cooper was removed from his trust by the court, and an action was brought on his bond. Billingsley paid all the claims that had been allowed against the estate in Dearborn county, and took an assignment of them. Samuel Cooper and wife borrowed money from John Huff, for which they executed a mortgage on the land devised to Anna Hayes, and with it paid Billingsley the amount expended by him in the payment of claims. The claims thus paid were assigned by Samuel and Anna Cooper to the appellant. A contract was entered into between Cooper and his wife and Mrs. Sykes, the mother of Enoch Hayes, before the assignment was made, which reads thus :

“Whereas, on an accounting this day between Mrs. Mary Ann Sykes and Samuel W. Cooper and Anna H. Cooper, his wife, it appears that Samuel W. Cooper and his wife have advanced and paid to H. L. Cooper, executor of Enoch Hayes, deceased, the sum of \$2,100, and have paid off debts of said Enoch Hayes, testator, to the amount of \$1,347.29, and that Mrs. Sykes, above named, has, also, by sale made of part of her land devised to her by Enoch Hayes, deceased, paid to said executor the further sum of \$1,515; and whereas there is a balance of \$1,000 unpaid of the allowance to Anna H. Cooper, widow of Enoch Hayes; now it is hereby agreed and witnessed that in full settlement and payment of the amount of the difference between the amount so advanced and of the one-half of the amount of debts so paid by Samuel W. Cooper and wife, and in consideration of the full release to said unpaid balance of said allowance to said Anna Hayes Cooper, as widow of Enoch Hayes, which is now and hereby released and discharged, the said Mary Ann Sykes has executed and does deliver simultaneously with this instrument, a lease to said Samuel W. Cooper and Anna H. Cooper of 89 acres of land in Dearborn county, Indiana, for the term of three years from March 1st, 1882, setting forth that the rent, except as to the annual taxes, which said Cooper agrees to pay, is paid in full; and further, that in consideration of a deed

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of conveyance of the tracts of land conveyed by H. L. Cooper, executor, to said Anna H. Cooper, recorded book 514, p. 279, executed by Anna and her said husband to said Mary Ann Sykes, she, the said Mary Ann Sykes, has paid in cash to said Cooper the sum of \$500, and assumes the payment, when due, of the note of said Anna H. Cooper for \$757.50, secured by a mortgage on said premises conveyed—that is to say, taking said conveyance subject to said mortgage.”

This contract controls the case. It is founded on a sufficient consideration, and so operates as to extinguish the claims assigned to Burkham. Mrs. Sykes had an interest in the land devised to her, but burdened with a charge, and she, therefore, had a right to contract for the removal of this burden. This she did. Mrs. Cooper undoubtedly had a like interest in her deceased husband's estate, and might, perhaps, have paid the claims and enforced them against the estate, but she chose to extinguish them by a contract with another devisee. Having received from that devisee full consideration for the claims which she had paid, and having elected to take that consideration rather than enforce the claims assigned to her, they ceased to be enforceable. They were paid by the consideration which moved to her from Mrs. Sykes. Mrs. Sykes had a right to ask that the claims should be extinguished by the consideration which she paid, and to this Mrs. Cooper acceded. Thus a valid and effective settlement of those claims was made, and that settlement can not be annulled, for neither fraud nor mistake is shown. Adjustments in the nature of family settlements are favored by law, and this adjustment was of that character. *Wright v. Jones*, 105 Ind. 17 (27).

As the contract governs the case and fully sustains the judgment of the trial court, it is unnecessary to discuss other questions.

Judgment affirmed.

Filed Nov. 14, 1888.

 Skinner v. Harrison Township.

No. 13,433.

SKINNER v. HARRISON TOWNSHIP.

116	139
116	359
119	259
116	139
139	134
116	139
161	540
161	558

WILL.—*Devise to Township for Support of Common Schools.*—*Intention of Testator.*—Where a devise is made to a township for the support of common schools, it clearly appears that the devise is to the school township.

SAME.—*Township Capable of Taking Under Will.*—*Trustee.*—A township in this State is made by statute a distinct municipal corporation for school purposes, and it is capable of becoming a trustee to receive funds bequeathed to it for the use of the public schools.

SAME.—*Latent Ambiguity as to Devisee.*—*Extrinsic Evidence.*—Where a testator devises property "to Harrison township," and it is made to appear by evidence that there are many townships of that name in the State, it is competent, in order to remove the obscurity in the testator's intention caused by the extraneous circumstances, to show by extrinsic evidence that the testator resided in Harrison township in a certain county, and that he sustained a relation to that township different from all others of like name.

From the Cass Circuit Court.

J. C. Nelson and *Q. A. Myers*, for appellant.

E. S. Daniels and *A. G. Jenkins*, for appellee.

MITCHELL, J.—On August 17th, 1866, Abraham D. Skinner, a resident of Harrison township, in Cass county, died testate, leaving no child or other heir at law, except his widow, Jane Skinner, to whom he devised and bequeathed eighty acres of land, together with his personal property, subject to the payment of his debts. Another eighty acres of land of which he was the owner was disposed of as follows:

"My land lying in section twenty-six (26), in the same town and range as above mentioned, on the west side of the LaPorte road, my wife to have the use of during her natural life, and at her decease to fall to Harrison township, said land to be sold by the authority of the township, and the money to be put at interest, and the interest to be used for the support of common schools in said township annually, each district to draw an equal share."

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The controversy is between Jane Skinner, the widow, and Harrison township, in Cass county, and the only question involved relates to the validity of the clause of the will above set out, and whether or not it is capable of being carried into effect.

The doctrine is, of course, familiar, that in the construction of a will the primary object is to discover and give effect to the intention of the testator, as it appears upon and is gathered from the words found in the instrument, and, although the testator's purpose must have been expressed in a manner conformable to the rules by which rights of property are secured and established, the law will not suffer his intention to be defeated merely because it may not have been declared with completeness, or with technical accuracy. *Van Gorder v. Smith*, 99 Ind. 404; *Bell County v. Alexander*, 22 Texas, 350.

One of the grounds of objection made to the will is that the devisee or trustee is not described or identified with sufficient certainty. The contention is, that without extrinsic evidence it is impossible to determine whether the civil or school township is meant, and it is urged, moreover, that there was evidence from which it appears that there are twenty-two townships in the State of Indiana known by the corporate name of Harrison township, and that hence the devise was void for uncertainty.

It is plain enough that the purpose of the testator was to provide a fund, the interest of which should be devoted to the support of the public schools of Harrison township, after the death of his wife.

While, according to our system, there are two corporations nominally within the same territory, one the civil township, the other the school township, both are, nevertheless, under the control of the same officer. The township trustee is, by virtue of his office, the trustee both of the civil and school township. Courts, therefore, take notice, as do all others concerned, that funds raised for or appropriated to the sup-

Skinner v. Harrison Township.

port of the common schools, pertain to the school corporation, and can only be administered by the trustee in that behalf. *Middleton v. Greeson*, 106 Ind. 18; *Inglis v. State, ex rel.*, 61 Ind. 212.

While, therefore, a devise or bequest to Harrison township is, *prima facie*, a devise or bequest to the civil township, yet when it appears that the intention of the testator was to create a fund to be administered for the support of the common schools, it is then rendered certain that the school township was meant. *Sheffield School Tp. v. Andress*, 56 Ind. 157.

In respect to the point that there are numerous townships answering the description of that named in the will, the rule applicable in such cases justifies the statement that where the object of the testator's bounty or the subject of disposition is described in terms which are applicable indifferently to more than one person or thing, extrinsic evidence is admissible in certain special cases to prove which of the persons or things so described by the testator was intended. *Wigram Wills*, p. 188.

Thus, in *Reynolds v. Whelan*, 16 L. J. N. S. 434, a testator, who was a farmer, by his will gave a legacy in these terms: "To William Reynolds, one of my farming men, if in my employ at the time of my decease, a sum of 100*l*." At the date of the testator's will, and at the time of his death, he had two persons in his service named William Reynolds. One of them was a farming man, and the other, who could turn his hand to anything, was employed both in the house and on the farm. Held, upon evidence showing the special relation and character of the service of the latter as compared with the former, that he was the person intended, and therefore entitled to the legacy.

The devise to Harrison township is neither ambiguous nor obscure until circumstances are shown which make it appear that there are other townships of the same name. This, then, is clearly a case of latent ambiguity, and it was, therefore, competent to show by extrinsic evidence that the testator re-

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sided in Harrison township, in Cass county, and that he sustained a peculiar relation to that township, different from all others of like name, so as to remove the obscurity occasioned by the extraneous circumstances. *Hiscocks v. Hiscocks*, 5 M. & W. 362; *Smith v. First Presbyterian Church*, 26 N. J. Eq. 132; *Taylor v. Tolen*, 38 N. J. Eq. 91; 1 Redfield Wills, p. 613.

It is contended next that neither the civil nor school township is capable in law of taking under the will. This position is not tenable. The effect of the will is to make the school corporation a trustee, in perpetual succession, to take a certain fund into which, upon the principles of equitable conversion, the land mentioned is transformed, in trust for the benefit of the common schools of the township. *Beardley v. Selectmen of Bridgeport*, 53 Conn. 489. This constitutes a bequest to a public and charitable use, and one toward which the courts extend a liberal construction in order to carry into effect the intention of the testator. *Clement v. Hyde*, 50 Vt. 716; *Town of Hamden v. Rice*, 24 Conn. 350.

A municipal corporation may be a trustee under the will of an individual when the trust created is germane to the purposes for which the corporation was called into being, and when the administration of the trust, and the liabilities it imposes, are not foreign to the objects for which the corporation was instituted. *Craig v. Secrist*, 54 Ind. 419; *Board, etc., v. Rogers*, 55 Ind. 297; *Philadelphia v. Fox*, 64 Pa. St. 169; *Chambers v. City of St. Louis*, 29 Mo. 543; *Girard v. Philadelphia*, 7 Wall. 1; *Bell County v. Alexander*, *supra*; *Carder v. Commissioners, etc.*, 16 Ohio St. 353; *First Congregational Society v. Atwater*, 23 Conn. 34; 1 Perry Trusts, sections 42, 43; 2 Dillon Munic. Corp., section 567.

Even if the trust be repugnant to or inconsistent with the proper purposes for which the corporation was created, this would furnish no ground upon which to declare an otherwise unexceptionable trust void. The corporation could not be compelled to execute it, and the intervention of the proper

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court might be required to appoint a new trustee in order to enforce and perfect the trust, but a court of equity would enforce it nevertheless. *Vidal v. Girard*, 2 How. 127 (187); *McDonogh v. Murdoch*, 16 How. 366.

Each civil township and each incorporated town or city in this State are, by the statute, declared distinct municipal corporations for school purposes, and are authorized to contract and be contracted with, to sue and be sued, and the primary purpose of the corporation is to receive and expend, in the support of our common schools, such funds as may lawfully come into its possession devoted to that purpose.

It is, therefore, clearly consistent with the purposes for which the school corporation was instituted that it should become a trustee to receive funds bequeathed to it for the use of the public schools. *Dascomb v. Marston* (Me.), 13 Atl. R. 888; 38 Alb. L. J. 369.

The argument of counsel, directed to the proposition that devises and bequests for charitable uses, where no trustee intervenes, and no estate is vested in the supposed beneficiaries, or where the objects of the testator's bounty are indefinite and uncertain, are not enforceable, is in our view of the case aside from the real question involved. The present is not such a case.

There would be no propriety, therefore, in entering upon an examination of the subject of charitable trusts in cases where no trustee capable of taking was provided for, and where the beneficiaries of the charity were not described with certainty, leaving them to be ascertained by those who might be charged with the management of the trust.

We have here, as we have seen, a trustee capable of taking and holding the trust estate or fund, while the objects of the testator's bounty, the common schools of the township, are definite and certain. The devise relates to matters which will promote the welfare of the schools of the township, and the duty of preserving the trust fund is germane to the purposes for which the corporation was created. Whether or

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not the trustee of the township will be compelled or permitted to administer the trust, or whether, if he does administer it, he shall do so in his official capacity as township trustee or under the jurisdiction or supervision of the proper court, are questions which do not affect the validity of the bequest. The testator having made a bequest to a trustee, capable of taking and holding the property in trust, for a well defined object, which is recognized as a public charity, we can not doubt that, at the proper time, the court having jurisdiction of such matters will take all needful steps to secure the preservation and administration of the fund.

This disposes of the questions discussed, and results in an affirmance of the judgment of the court below.

Judgment affirmed, with costs.

Filed Nov. 14, 1888.

116 144
130 392

No. 14,224.

DUESTERBERG ET AL. v. THE STATE, EX REL. CITY OF
VINCENNES.

INTERROGATORIES TO JURY.—*Withdrawal.*—*Right of Opposite Party to Demand Answers.*—Where relevant and material interrogatories have been submitted to the jury on the motion of a party, they can not be withdrawn if the opposite party objects, but the latter has a right to demand that they be answered, and it is error to refuse to require answers.

From the Knox Circuit Court.

T. R. Cobb, O. H. Cobb, W. A. Cullop and G. W. Shaw,
for appellants.

H. S. Cauthorn and J. M. Boyle, for appellee.

ELLIOTT, J.—Five material and relevant interrogatories were submitted to the jury on the motion of the relator. The jury came into court with a general verdict, but did not answer any of the interrogatories. The appellants asked that the jury be required to answer the interrogatories and the relator asked leave to withdraw them. The court refused to require the jury to answer the interrogatories, received the general verdict and discharged the jury.

The trial court erred in refusing to require answers to the interrogatories propounded by the relator. The appellants had a right to require answers although the interrogatories were propounded by the adverse party. The party who secures the submission of interrogatories may not withdraw them after the return of the general verdict. When approved by the court and properly submitted to the jury they become a matter of interest to both parties and neither can deprive the other of a right to have answers returned by the jury. If it were otherwise, a party might be misled by relying upon interrogatories asked by his adversary. But we deem it unnecessary to pursue the discussion, for we think the question is settled against the appellee by our authorities. The result of the cases is thus stated by Mr. Works: "When the court has submitted proper interrogatories to the jury, the parties have the right to have them answered, and they can not be withdrawn without the consent of the parties." 1 Works Pr., section 863. In another work it is said: "And this is true even though the party requesting their submission agree to their withdrawal, if the opposite party objects; for either has a right to insist that they be answered." Thornton Juries, section 372. In *Sage v. Brown*, 34 Ind. 464, it was said: "It was the province of either party to demand that the special verdict should be properly signed, and that the questions should be answered." It was held in *Peters v. Lane*, 55 Ind. 391, that it was error to refuse to compel more specific answers to interrogatories, although the

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interrogatories were submitted by the appellees and not the appellants. We need not, however, comment upon the decisions in detail; it is enough to say that the current of opinion is, that when once the interrogatories have been submitted to the jury, under proper instructions, neither party has exclusive control over them. *Wood v. Ostram*, 29 Ind. 177; *Noakes v. Morey*, 30 Ind. 103; *Otter Creek, etc., Co. v. Ranney*, 34 Ind. 329; *Maxwell v. Boyne*, 36 Ind. 120; *Pitzer v. Indianapolis, etc., R. W. Co.*, 80 Ind. 569; *Summers v. Greathouse*, 87 Ind. 205; *Groscop v. Rainier*, 111 Ind. 361.

The relevancy and materiality of the interrogatories clearly appear. There is no room for debate upon that subject. The general verdict could not have been rendered without an investigation of the facts embraced by the interrogatories.

Judgment reversed, with instructions to sustain the appellants' motion for a new trial.

Filed June 28, 1888; petition for a rehearing overruled Nov. 15, 1888.

116	146
118	563
116	146
126	214
116	146
138	160
116	146
149	133
116	146
167	547

 No. 13,400.

PADDOCK ET AL. v. WATTS.

MALICIOUS PROSECUTION.—*Malice.*—*Probable Cause.*—To sustain an action for damages for instigating or prosecuting a criminal action, which terminated in the plaintiff's acquittal, it must be shown that the defendant instituted the action in malice and without probable cause.

SAME.—*Collateral Purpose in Instituting Prosecution.*—Where a criminal prosecution is commenced under circumstances which make it apparent that the person instituting the same had some collateral purpose in view, rather than the vindication of the law, a finding of a want of probable cause will be justified.

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SAME.—Advice of Counsel.—It is competent for the defendant, in order to disprove malice, to show that in instituting criminal proceedings he acted under the advice of counsel; but to obtain immunity he must have made a full and fair statement of all the facts known to him.

SAME.—Evidence.—Where the prosecuting attorney testifies that upon the state of facts communicated to him by the defendant he advised the institution of criminal proceedings against the plaintiff, it is competent, on cross-examination, to ask him, as an expert, whether or not, if the facts were different in a specified particular from those stated by the defendant, he would have given the advice he did.

PRACTICE.—Judgment.—Defective Verdict.—Venire de Novo.—Motion in Arrest.—Where the obstacle in the way of the rendition of judgment is a defective verdict, the correctness of the judgment can not be called in question on appeal unless a motion for a *venire de novo*, or, the whole record being defective, a motion in arrest, was made below.

From the Vigo Circuit Court.

I. N. Pierce, J. G. Williams and T. W. Harper, for appellants.

C. F. McNutt, J. G. McNutt, S. C. Davis, S. B. Davis and S. R. Hamill, for appellee.

MITCHELL, J.—This was an action by James W. Watts against William, Benjamin F. and David E. Paddock, to recover damages for an alleged malicious prosecution instituted by the Paddocks against the plaintiff Watts in the Vigo Circuit Court.

The plaintiff charged that the defendants unlawfully, wrongfully, maliciously and without probable cause, procured an indictment to be found and returned against him by the grand jury of Vigo county, in which the plaintiff was charged with the crime of embezzlement. It was alleged that the plaintiff had been arrested and tried upon the charge so preferred, and that he had been found not guilty, and discharged accordingly.

The defendants joined in pleading the general issue. There was a verdict for the plaintiff against all the defendants for \$750, upon which judgment was rendered against William and Benjamin F. Paddock, over their joint motion for a

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new trial, while David E. Paddock was awarded a new trial upon his separate motion.

It is contended on behalf of the appellants, with much earnestness, that the verdict is not sustained by the evidence. It appears that the defendants were partners in the summer of 1882, engaged in the milling business in the city of Terre Haute. They employed the plaintiff to purchase wheat, the defendants agreeing to furnish the money and to pay the plaintiff a commission of three cents per bushel on one kind of wheat, and to share the profits equally with him on all the wheat of another kind which he should purchase for them. Considerable quantities of wheat were purchased, and a large sum of money furnished under this arrangement, which was continued until in the autumn of 1882. After the plaintiff ceased purchasing wheat, an accounting was attempted between the parties, and a dispute arose concerning a certain check drawn by Paddock & Co. in favor of the plaintiff for one thousand dollars upon the First National Bank of Terre Haute. That a check for that amount was drawn payable to Watts or bearer, on the 26th day of July, 1882, and that it was paid by the bank on that day to some one is not disputed. Watts had no account of it on his books, and according to his testimony he disputed the fact of ever having received the check, or the money it called for, although the amount was charged to him on the books of Paddock & Co. Failing to arrive at a satisfactory adjustment of their affairs, Watts commenced a civil suit against Paddock & Co. for damages growing out of an alleged violation of their contract, after which, at the instigation and upon the testimony of the appellants, the grand jury of Vigo county returned an indictment charging him with having embezzled the appellants' money and checks. After hearing the evidence on behalf of the State, the court directed a verdict of acquittal, and this ended the criminal prosecution, which is now alleged to have been begun maliciously and without probable cause.

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In order to sustain an action to recover damages for instigating or prosecuting a criminal action, which has terminated in the plaintiff's acquittal, it must be shown that the defendant instituted the action in malice and without probable cause. The essential ground of the action is, that a criminal prosecution has been instituted and carried on without probable cause. In the absence of probable cause malice may be implied. *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Stone v. Crocker*, 24 Pick. 81.

Whether there was probable cause for the criminal prosecution instituted by the defendants depends upon whether or not the above mentioned check for one thousand dollars, drawn on the 26th day of July, 1882, by Paddock & Co. in favor of Watts, was ever delivered to, and the amount of money for which it called properly charged against him on the books of Paddock & Co. If it was, or if, after such reasonable and proper inquiry as prudent persons ought to make, the defendants honestly believed it had been, there may have been probable cause for the prosecution. If it was not, and the defendants ought or might have known the facts, the prosecution was commenced without probable cause. There was evidence tending to show that Watts never received the check nor the money; that he was not in the city of Terre Haute within banking hours on the day on which the check was drawn by the defendants and paid by the bank. One of the firm of Paddock & Co. testified that he drew the check, payable as above, and delivered it to Watts in person on the day on which it bears date. This the latter denied. He also produced evidence corroborative of his theory, showing that the check could not have been paid to him on the day on which the bank paid it. If it was true, as was assumed and contended by Watts, that Paddock & Co. drew their check for one thousand dollars, payable to James W. Watts or bearer, and never delivered it to him, or to any one at his request or for his benefit, that they charged the amount called for by the check against him on their books without

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any right to do so, and then caused him to be prosecuted for the crime of embezzlement, while he disputed that item of their account, and while he was prosecuting a civil action against them claiming that they owed him, then, of course, the verdict of the jury was supported by the evidence. The jury must have accepted the theory put forward by Watts, and it can not be said that it finds no support in the evidence.

Where a criminal prosecution is commenced under circumstances which make it apparent that the prosecutor had some collateral purpose in view, rather than the vindication of the law, as where a prosecution was commenced in order to compel the surrender of notes about which there was a dispute, a finding of a want of probable cause will be fully justified. *Kimball v. Bates*, 50 Maine, 308; *Brooks v. Warwick*, 2 Stark. 342; *McDonald v. Rooke*, 2 Bing. N. C. 219.

We can not reverse the judgment upon the evidence. An examination of the instructions given to the jury, and a consideration of the objections made to them by the appellants, lead to the conclusion that the court committed no error in that connection which was prejudicial to the appellants. The contention that the 13th instruction was not applicable to the evidence is not, in our opinion, sustained by the record.

The point is made in the brief that the court committed error in rendering judgment against the appellants William and Benjamin F. Paddock, over their objection, after having granted a new trial to their co-defendant, David E. Paddock.

If there was any impediment in the way of the rendition of a judgment after granting a new trial to one of the defendants who was found jointly liable, it was because the verdict was there defective.

Ordinarily, questions of this character can only be presented by moving for a *venire de novo*, unless the whole record, including the verdict, is so defective as that no judgment can properly be rendered, when a motion in arrest may raise the question. *Boor v. Lowrey*, 103 Ind. 468.

In the present case it is conceded that there was no motion

either for a new venire or in arrest. It is contended, however, that the objection made by the appellants to the rendition of judgment against them, after a new trial had been granted their co-defendant, performed substantially the same office as a motion in arrest. We do not concur in this view, nor are we to be understood as conceding that a motion in arrest would have raised the question in the present case if one had been made. It is not necessary, however, to decide that question.

During the progress of the trial the prosecuting attorney, who, upon the facts as communicated to him by the appellants, advised the institution of a criminal prosecution against Watts, after having testified to that effect in appellants' behalf in chief, was asked the following question on cross-examination: "State if you had known that he still disputed the payment of the check, and disputed that he got it, would you have given the advice you did?" To which the witness responded that he "would not."

It was competent for the defendants, in order to disprove malice, to show that in instituting criminal proceedings they acted under the advice of competent counsel. Where one lays all the facts before counsel, and acts in good faith upon an opinion given, he is not liable to an action, even though it turn out that he was mistaken. But in order that he may obtain immunity, he must have made a full and fair statement of all the facts known to him. *McCarthy v. Kitchen*, 59 Ind. 500, and cases cited; *Center v. Spring*, 2 Iowa, 393.

The prosecuting attorney having testified that, upon a certain hypothesis or state of facts communicated to him by the appellants, he, as a lawyer, and an officer of the law, advised the institution of criminal proceedings against Watts, it was competent to ask him, as an expert, whether or not, if the hypothesis or facts upon which he proceeded had been changed in the manner indicated by the question, he would have arrived at a different conclusion. This was only an

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other way of showing the materiality of the facts assumed to have been withheld from the prosecuting attorney.

We have found no error. The judgment is affirmed, with costs.

Filed Nov. 15, 1888.

No. 13,306.

WOODARD ET AL. v. BAKER.

116	152
149	454

APPEAL.—*Reserved Question of Law.*—*Statute Construed.*—*Practice.*—Section 630, R. S. 1881, does not contemplate that a party may reserve for the decision of the Supreme Court, in the mode therein prescribed, a question of fact, or mixed question of fact and law; but the question reserved must be one of law only, which arose and was decided during the progress of the cause, and the record must show that an exception was reserved to the decision of such question at the time it was made.

SAME.—*Final Decision.*—*Reserved Question Upon.*—After the evidence has been fully heard upon the trial of the issues joined in a cause, and the court has announced its final decision and judgment in favor of the defendant, the plaintiff can not reserve that decision, under section 630, R. S. 1881, the same not being a question of law nor a decision during the progress of the cause within the meaning of that statute.

SUPREME COURT.—*Question Depending Upon Evidence.*—*When not Presented.*—Where the decision of a question requires a consideration of the evidence, and the record fails to show that it contains all the evidence given in the cause, such question is not presented.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellants.

H. C. Dodge, for appellee.

Howk, J.—This was a suit by appellants, Woodard and Fieldhouse, the plaintiffs below, against appellee, Ella Baker,

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as defendant, in a complaint apparently in two paragraphs. What became of the first paragraph is not clearly disclosed by the record. In the second paragraph, which is the only complaint in the transcript filed here on this appeal, the plaintiffs averred that, on the 16th day of September, 1884, defendant executed her five promissory notes, of which copies were therewith filed; that to secure the payment of said notes, which were payable to the order of one C. S. Frink, defendant also executed a chattel mortgage, whereof a copy was therewith filed; that the first note was due and unpaid; that, on January 2d, 1885, said Frink endorsed said notes and mortgage to the plaintiffs; that, by the terms of said mortgage, defendant was prohibited from selling the mortgaged goods; that defendant wrongfully sold and disposed of said goods to the value of \$1,500, and used of the proceeds of such sales the sum of \$1,000 in purchasing and paying for new goods, then in said stock of goods and so intermixed with the old goods that plaintiffs could not identify them; that said new goods, so purchased, were and of right ought to be held in trust for the plaintiffs, as having been purchased with their moneys and the proceeds of their goods; that the other \$500, received by defendant, had been used by her in living and for her own private purposes, and plaintiffs of right ought to have a personal judgment therefor in conversion. Plaintiffs asked that defendant be compelled to identify the goods so purchased with their means, and that they have a foreclosure of said mortgage on the new goods so purchased, as well as on the old goods covered by the mortgage, and a personal judgment for the value of the goods sold, where the proceeds had been converted by defendant, in the sum of \$1,000, and all other proper relief.

Defendant answered by a general denial of the complaint. The cause being at issue was submitted to the court for final hearing; and the court found for defendant, "that the plaintiffs should fail in this prosecution and defendant recover her costs," and rendered final judgment accordingly. Plaintiffs'

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motion for a new trial having been overruled by the court, they have appealed from the judgment below to this court.

Error is assigned here by plaintiffs solely upon the overruling of their motion for a new trial. In that motion, the only causes assigned for such new trial were (1) that the decision of the court below was contrary to law, and (2) that such decision was not sustained by sufficient evidence. This cause was appealed to this court on a reserved question of law during the progress of the cause, under the provisions of sections 630 and 631, R. S. 1881. In section 630, *supra*, so far as applicable to the case in hand, it is provided as follows: "Either party may reserve any question of law decided by the court during the progress of the cause, for the decision of the Supreme Court. Any question of law so reserved may be taken to the Supreme Court upon the bill of exceptions showing the decision. * * * When the question so reserved is shown by the bill of exceptions, the party excepting shall notify the court that he intends to take the question of law to the Supreme Court upon the bill of exceptions only; and the court shall thereupon cause the bill of exceptions to be so made that it will distinctly and briefly embrace so much of the record of the cause only and the statement of the court, as will enable the Supreme Court to apprehend the particular question involved." Section 631, *supra*, prescribes the time within which an appeal, upon a reserved question of law, must be taken, and provides that such appeal shall not operate as a *supersedeas*, "unless so ordered by the Supreme Court or some judge thereof."

In the cause now before us it is shown by the bill of exceptions "that, during the progress of the cause, the court decided and adjudged that the plaintiffs were not entitled to a judgment or decree of foreclosure on the second paragraph of their complaint." It is further shown in said bill "that said plaintiffs, at the proper time, notified the court that they would reserve the question of law, so decided, for the decision of the Supreme Court on the bill of exceptions only."

Thereupon, in order to enable the Supreme Court to apprehend the question, the court ordered the record to be made up as follows, to wit: The second paragraph of complaint, the answer of general denial, the motion for a new trial, and entries connected therewith, and the following items of evidence given on the trial of the cause: The chattel mortgage and notes sued upon, copies of which were made exhibits with said complaint.

J. A. Baker, a competent witness, testified that he was defendant's husband, and did all the business for her in connection with said drug store; that he had sold the old stock of drugs by way of retail daily, after the mortgage was given; had used some of the proceeds in making payments upon the notes sued on, had used some of the proceeds in payment of living expenses, and had bought new goods with the balance; that he had bought \$1,002.72 worth of new goods and placed in said old stock, and that, of these new goods, there was on hand, at the time this action was commenced, \$399.90 worth at cost prices; that of these new goods so bought, he had paid for about \$625 worth, and about \$375 worth were not paid for; that the moneys so paid on the notes sued upon, and so paid on said new goods, were wholly from the proceeds of sales of said mortgaged stock, except \$100 that he received from the sale of a lot; that the value of said old goods, at the time this action was commenced, was \$1,491, and the original cost price of said old goods was \$1,948.

The court stated that plaintiffs had taken possession of all of said goods, old and new, by a writ of replevin before this action was brought; that after a portion of the evidence was heard, but before the decision was made, plaintiffs dismissed the first paragraph of their complaint and sold said old goods without any decree or order of court, at public auction upon due notice, and realized therefor the sum of \$655, although said goods so sold were worth \$1,461.66 at the time of said sale; and that plaintiffs' notes were unpaid, except by the seizure

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and sale of the goods aforesaid, and amounted to the sum of \$1,100.

This was "the bill of exceptions only," upon which plaintiffs have presented here their so-called "question of law," reserved for the decision of this court. Is the fact recited in such bill, "that, during the progress of the cause, the court decided and adjudged that the plaintiffs were not entitled to a judgment or decree of foreclosure on the second paragraph of their complaint," a reserved question of law within the purview and meaning of the provisions of section 630, *supra*, heretofore quoted in this opinion?

This is the question which confronts us *in limine*, in the consideration of this cause, and we are of opinion that the question stated can only, and must, be answered in the negative. The reserved question, as stated in the bill of exceptions, necessarily involves and includes questions of fact as well as a question of law, and of these the questions of fact are fundamental.

Our statute does not contemplate or provide that a party may reserve a question of fact, or mixed questions of fact and of law, decided by the trial court, in the mode prescribed by section 630, *supra*, for the decision of this court; but the question so reserved must be one of law, pure and simple, unmixed with any questions of fact. Not only so, but it must be a question of law, which arose and was decided by the court during the progress of the cause; and it must be shown by the record that the party, who reserves the question of law so decided, for the decision of the Supreme Court, excepted at the time to the decision of such question by the court below. "Real questions, such as actually arise during the progress of the trial, may be reserved, but not mere general questions, which are not presented in the progress of the cause." *Short v. Stutsman*, 81 Ind. 115.

The questions that may be reserved under section 630, *supra*, "are such as actually arise and are decided during the

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progress of the cause—such, for instance, as are made in admitting or excluding testimony, in giving or refusing instructions,” etc. “Again, if the question is decided during the progress of the cause, an exception must be reserved to the decision, in order to save the question. This rule is familiar, and is as applicable to a question reserved under section 347 of the code (630, *supra*), as to a question presented in any other way.” *Short v. Stutsman, supra.* *Downs v. Opp*, 82 Ind. 166; *Conner v. Town of Marion*, 112 Ind. 517.

In the case in hand, after the evidence had been fully heard upon the trial of the issues joined, and the court had announced its final decision and judgment in favor of defendant, the plaintiffs undertook to reserve that decision and judgment as a question of law, decided by the court below during the progress of the cause, for the decision of the Supreme Court. This proceeding or undertaking of plaintiffs was wholly unauthorized by any law of this State. That decision and judgment of the court, as we have shown, was not a question of law within the meaning of the provisions of section 630 above quoted. If it were a question of law, it was not decided by the court below during the progress of the cause, but was the end and final disposition thereof. The record wholly fails to show that the plaintiffs, in any manner or at any time, saved an exception to the decision by the court below of the so-called question of law attempted to be reserved for the decision of this court. We are of opinion, therefore, that no question has been saved in and presented by the record now before us which we can consider and decide. Of course, the error assigned here by plaintiffs presents no question for our decision, because the record fails to show that it contains all the evidence given in the cause. *Collins v. Collins*, 100 Ind. 266; *Beatty v. O'Connor*, 106 Ind. 81; *Garrison v. State*, 110 Ind. 145.

The judgment is affirmed, with costs.

Filed Nov. 17, 1888.

Wheeler v. The City of Plymouth.

116	158
117	127
129	40

No. 13,490.

WHEELER v. THE CITY OF PLYMOUTH.

CITY.—Explosives.—Negligence.—Damages to Property of Citizen.—Liability of City.—A city is not liable for damages caused to the property of a citizen by the negligent manner in which other persons, acting under permission from the mayor, fire explosives within the city.

SAME.—Failure to Enforce or Enact Ordinances.—A municipal corporation is not liable for a negligent failure to enforce an ordinance, nor for omitting to enact ordinances.

SAME.—Liability for Act of Licensees.—A municipal corporation is not liable for the acts of its licensees unless it is shown that an act authorized was dangerous in itself.

From the Marshall Circuit Court.

S. Parker, for appellant.

A. C. Capron, for appellee.

ELLIOTT, J.—The city of Plymouth had in force on the 4th day of July, 1885, and for a long time prior to that day, an ordinance prohibiting the firing of gunpowder or any other explosive substance, except in cases where the mayor, on occasions of public rejoicing, granted permission to fire guns, cannon or other things in which gunpowder could be used. On the day named the mayor did grant permission to fire gunpowder in an anvil on a lot in the city near where there was sand, gravel and other things of like character. In firing the anvil pebbles and gravel were thrown against the plate-glass doors of the appellant's building, shattering and breaking them. For the loss thus caused him he brings this action. The action can not be maintained.

A municipal corporation is not liable for a negligent failure to enforce an ordinance, nor is it liable for omitting to enact ordinances. *City of Lafayette v. Timberlake*, 88 Ind. 330, and authorities cited; *Dooley v. Town of Sullivan*, 112

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Ind. 451 (2 Am. St. R. 209); *McDade v. Chester City*, 117 Pa. St. 414 (2 Am. St. R. 681).

There is no actionable breach of corporate duty in failing to enact a proper ordinance, or in failing to enforce one that has been enacted, and, consequently, this action can not be maintained upon the theory that there was not a proper ordinance, nor upon the theory that the ordinance was not enforced.

The act of the mayor in granting permission to fire the anvil did not create a liability against the city. The utmost that can be granted is that the act of the mayor constituted the wrong-doers the licensees of the corporation, and granting this, but by no means so deciding, the city is not liable for their act, because it is not shown that it was intrinsically dangerous. It is quite well settled that a municipal corporation is not liable for the acts of its licensees unless it is shown that they were authorized to perform an act dangerous in itself. *City of Warsaw v. Dunlap*, 112 Ind. 576 (580); *Dooley v. Town of Sullivan*, *supra*; *Ryan v. Curran*, 64 Ind. 345 (31 Am. R. 123).

Here there is nothing to show that the authorized act was intrinsically dangerous; on the contrary, the danger arose from the negligent manner in which the licensees performed the act.

Judgment affirmed.

Filed Nov. 16, 1888.

McKinney v. Snider *et al.*

No. 13,381.

MCKINNEY v. SNIDER ET AL.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.—*Complaint.*—*Necessary Averments.*—Where the complaint in proceedings supplementary to execution fails to show that an execution had issued to the sheriff of the county in which the debtor resides, or to the sheriff of the county in which the judgment was rendered, in case the debtor is a non-resident of the State, it is bad.

SAME.—*Exemption.*—*Pleading.*—A general averment that the amount due from a third person to the execution defendant, together with the other property belonging to the latter, exceeded the amount which he was entitled to claim as exempt from execution, is merely the statement of a legal conclusion.

From the Clinton Circuit Court.

J. N. Sims, for appellant.

B. K. Higinbotham, M. Bristow, T. H. Palmer, W. F. Palmer and *S. O. Bayless*, for appellees.

MITCHELL, J.—McKinney commenced a proceeding supplemental to execution by filing a verified complaint in which he alleged that he had recovered judgment for \$254.20 against James B. Snider, in the Clinton Circuit Court, on the 4th day of September, 1879, which judgment remained wholly unpaid. It was averred that an execution had been duly issued, and that the defendant, the Louisville, New Albany and Chicago Railway Company, was indebted to Snider in the sum of \$500, "which together with property which said Snider might lawfully claim as exempt from execution exceeds the amount of his said exemption." It was averred that the defendants "wrongfully withheld" the money from the payment of plaintiff's judgment. The court sustained a demurrer to the complaint.

Before a judgment creditor is entitled to resort to the extraordinary remedy of a proceeding supplemental to execu-

McKinney v. Snider et al.

tion, he must first have procured an execution against the property of the judgment debtor to issue to the sheriff of the county in which the debtor resides, or, if he do not reside in the State, to the sheriff of the county in which the judgment was rendered. When an execution so issued has been returned unsatisfied in whole or in part, the creditor shall be entitled to an order requiring the judgment debtor to appear forthwith and answer concerning his property.

It is averred in the complaint in the present case that an execution was issued, but the complaint wholly fails to indicate whether or not it issued to the sheriff of the county in which the execution defendant resided.

In *Fowler v. Griffin*, 83 Ind. 297, this court said: "It is just as necessary that the complaint should show that the execution had issued to the proper county, as that it had issued at all." Accordingly it has been repeatedly held that the absence of an averment showing that an execution had issued to the sheriff of the county in which the execution debtor resides, or of the county in which the judgment was rendered, in case the debtor is a non-resident of the State, renders the complaint fatally defective. *Pouder v. Tate*, 111 Ind. 148.

The averment that the amount due from the railroad company, together with the other property of the execution defendant, exceeded the amount which the latter was entitled to claim as exempt from execution, was nothing more than the statement of a legal conclusion. It was not a statement of the facts showing that the debt, together with other property claimed by the debtor as exempt from execution, exceeded the amount of property owned by the debtor which by law he was entitled to exempt. *Abell v. Riddle*, 75 Ind. 345; see, also, *Mitchell v. Bray*, 106 Ind. 265.

The court committed no error.

The judgment is affirmed, with costs.

Filed Nov. 17, 1888.

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The State, *ex rel.* Martindale, Prosecuting Attorney, *v.* Lauer.

116 169
116 514
117 479

No. 13,432.

THE STATE, EX REL. MARTINDALE, PROSECUTING ATTORNEY, *v.* LAUER.

TAXES.—*Personal Property.*—*Fraudulent List.*—*Penalty.*—A taxpayer who returns a false and fraudulent list of his personal property subject to taxation, is liable to the penalty prescribed by section 6339, R. S. 1881. **SAME.**—*Notice to Prosecuting Attorney.*—*Pleading.*—The notice which the statute provides the assessor shall give the prosecuting attorney of the taxpayer's offence, is no part of the definition of the offence, and need not be averred in the complaint to recover the penalty.

From the Marshall Circuit Court.

L. T. Michener, Attorney General, *W. B. Hord*, *E. C. Martindale*, Prosecuting Attorney, and *J. D. McLaren*, for the State.

L. M. Lauer, for appellee.

ELLIOTT, J.—This action is prosecuted under the provisions of section 6339 of the Revised Statutes of 1881, to recover the statutory penalty for making and returning a false and fraudulent list of taxable property.

The complaint reads thus: "The plaintiff complains of the defendant, and says that the said defendant now is, and has been for two years last passed, a resident of the city of Plymouth, in Center township, Marshall county, Indiana; that the assessor of said township, John A. Palmer, between the 1st day of April, 1886, and the 1st day of June of said year, gave to the defendant a blank schedule to be by the defendant filled out, and to make a true list of his personal property owned by him on the 1st day of April, 1886, and subject to taxation; that, on the 19th day of April, 1886, the defendant gave to the said assessor a false and fraudulent list and schedule of his personal property subject to taxation on said 1st day of April, to wit, the defendant gave in as money

The State, *ex rel.* Martindale, Prosecuting Attorney, *v.* Lauer.

loaned on time or call the sum of \$2,700, when, in truth and in fact, said defendant had, on the said 1st day of April, a much larger sum of money loaned, to wit, the sum of \$12,519, to divers citizens of said State; that the defendant was, on said 1st day of April, the owner of a large stock of dry goods and merchandise of the value of \$3,000, all subject to taxation, which he failed to list and give in as shown in said list and schedule which is filed herewith marked exhibit 'A,' and made part hereof; that said list and schedule, given to said assessor as aforesaid, is false and fraudulent as aforesaid."

The validity of the act under which the action is prosecuted is very satisfactorily vindicated by the decision in *Burgh v. State, ex rel.*, 108 Ind. 132, and we do not deem it necessary to add anything to what was there said.

We assume that the validity of the act is established, and, acting upon this assumption, we proceed to consider whether the complaint states a cause of action. It is not a faultless pleading by any means, but we think it contains sufficient facts to repel a demurrer.

Counsel is in error in affirming that the complaint does not aver that the appellee had more money loaned on the 1st day of April, 1886, than he returned for taxation. A fair construction of the language of the pleader leads to the conclusion that on that day the appellee had loaned money to the amount of \$12,519, whereas he returned for taxation only \$2,700, a sum very much less than he actually had out on loans. It was his duty, under the law, to have accounted for all the money invested in loans, and having falsely and fraudulently returned a much less amount than the true one, he must suffer the penalty prescribed by law. The leading purpose of the law is to compel a true and just listing of personal property of all kinds, and to punish the taxpayer who fraudulently attempts to escape payment of the tax upon his personal property.

There is no merit in the contention of appellee's counsel

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that the complaint is bad because it does not aver a request to make out a list. This we say because the complaint shows the delivery of a blank list to the appellee, and that he filled it up and returned it to the assessor. He accepted the blank given him, and fraudulently filled it up so as to evade payment of the tax on a great amount of property.

It is not necessary that the complaint in such a case as this should allege that the prosecuting attorney was notified of the wrong done by the taxpayer. The offence consists in making a false and fraudulent list or schedule, and the provision requiring notice to be given the prosecuting attorney is no part of the definition of the offence, but is simply a direction to the assessor to give notice to the proper officer of the taxpayer's offence.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

Filed Nov. 17, 1888.

116	164
137	239
137	485
139	516

No. 13,428.

RUNYON v. SNELL.

PRINCIPAL AND AGENT.—*Husband and Wife.*—The same principles govern dealings between a third person and an agent whose principal is his wife, as govern where the principal and agent are in other respects strangers; and one who purchases the wife's property through the agency of the husband must pay for it precisely as if he had purchased through any other agent.

SAME.—*Sale of Real Estate.—Payment.—Unauthorized Acceptance of Promissory Notes.*—Where a husband, who is acting as the agent of his wife in the sale of her real estate, accepts his own note and the note of a third

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person for the purchase-price, without authority to do so, the acceptance of such notes does not constitute payment, and the wife is entitled to affirm the contract and recover of the purchaser the agreed consideration.

SAME.—Presumption.—Burden of Proof.—There is no presumption that an agent, with authority to sell and accept payment for his principal, is authorized to receive his own notes or the notes of a third person in payment, but the burden is upon the purchaser to show affirmatively that the agent had such authority.

SAME.—Statute of Limitations.—Where payment, *sub modo*, of an admitted indebtedness has in fact been made to the agent in such manner that the principal is entitled to affirm or repudiate it upon learning the facts, the statute of limitations does not begin to run until the facts are known or the payment disaffirmed.

From the Delaware Circuit Court.

G. H. Koons and J. F. Duckwall, for appellant.

MITCHELL, J.—The plaintiff, Eliza A. Runyon, alleges in her complaint that, on the 5th day of November, 1877, she was the owner of a certain lot in the city of Muncie in Delaware county, of the value of eleven hundred dollars, which she on that day conveyed to the defendant, Solomon R. Snell, in consideration of an agreement on the part of the latter to convey to her certain real estate which he owned in the State of Iowa. It is alleged that after receiving the conveyance of the plaintiff's real estate, the defendant refused to convey the Iowa land in compliance with his contract, to the plaintiff's damage, etc. This action was commenced in the month of October, 1884.

The defendant answered by a general denial, the six years statute of limitations, and that he had fully paid and satisfied any claim or demand for money growing out of the alleged conveyance of real estate to him.

The cause was submitted to a jury, and upon a verdict duly returned there was judgment for the defendant.

After carefully considering the evidence, we are constrained to the conclusion that the court erred in overruling the plaintiff's motion for a new trial.

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There is no dispute but that the real estate conveyed to the defendant was the separate property of the plaintiff, a married woman, and it is equally beyond dispute that she has never received the value of a farthing, either in money or property, for the conveyance. Of course, if she authorized her husband to sell her property, and received payment for it, and the defendant has made payment in good faith, the plaintiff can not now complain, even though her husband may have abused her confidence and violated his obligation and duty as her agent. It must be understood, however, that the principles which govern in dealing with an agent are the same, where the agent happens to be a husband whose principal is his wife, as where the principal and agent are in other respects strangers, and that one who purchases the property of a married woman through the agency of her husband must pay for it precisely as if he had purchased through an agent who sustained no such relation. With these principles in view, we proceed briefly to consider the evidence. Accepting the defendant's testimony as true, it appears that in 1877 he held certain notes against George W. Runyon, the plaintiff's husband, amounting to about three hundred dollars. He charged Runyon with having forged the name of another as surety upon one or more of the notes, and demanded that they be taken up. Mrs. Runyon had previously authorized her husband to sell her property, and he then proposed to sell it to the defendant. The latter agreed to purchase and pay five hundred and fifty dollars for the lot, and to turn in Runyon's notes, and another note, which the evidence tends to show was worthless, against one Glick, as part payment, and to pay the balance of the purchase-price in cash. This arrangement was consummated between Runyon and the defendant.

Both Mrs. Runyon and her husband testify, and we find no evidence to the contrary, that she was induced to believe that her property was being exchanged to the defendant for land in Iowa, and the evidence makes it clear beyond doubt that

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she signed the deed conveying her property to the defendant under that belief.

There is no evidence which tends to show that she knew that her property had been sold, or that she authorized her husband to receive payment in the manner described. The defendant admits that she asked him again and again about the deed for the Iowa land. It may be conceded, for the purposes of this case, that Runyon had been guilty of forgery, and that he alone was instrumental in deceiving his wife, and that his motive in misleading her was to induce her to convey her property to the defendant so as to suppress any criminal prosecution which may have threatened him. The fact remains, nevertheless, that the defendant admits that he purchased Mrs. Runyon's separate property, and agreed to pay \$550 for it, and that by an arrangement between himself and her husband he paid for it in the manner already described. In the absence of any evidence showing authority on the part of the husband to receive payment in that manner, or that the plaintiff subsequently ratified his acts, the acceptance of notes instead of money can not be regarded as payment. When a debtor claims to have paid his debt by the delivery of property; or through any other medium than money or commercial paper, he assumes the burden of proving that what was given was received in payment.

There is no presumption that an agent, with authority to sell and accept payment for his principal, is authorized to receive in payment notes of which he is the maker, nor can he be presumed to have authority to accept the notes of third persons in payment of purchase-money due his principal. *Robinson v. Anderson*, 106 Ind. 152.

One who purchases property of an agent, and attempts to prove payment by a method so extraordinary as that claimed by the defendant, is bound to show affirmatively that the agent had authority to receive payment in the manner claimed. *Stewart v. Woodward*, 50 Vt. 78; *Victor Sewing Machine Co. v. Heller*, 44 Wis. 265.

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The defendant obtained the title to the plaintiff's property, as he asserts, through a contract made with her husband, to whom he also claims to have made payment. To the extent that he has paid for it otherwise than with money, he has made no payment at all, and the plaintiff is entitled, upon the defendant's own theory of the case, to affirm the contract and recover the unpaid purchase-price.

The plea of the six years statute of limitations is not proved. The defendant having assumed to pay an admitted indebtedness to the plaintiff's agent, in a particular manner, by the delivery of notes, it does not lie in his mouth to say that the plaintiff's right of action accrued, until she knew, or ought to have known, the facts, and repudiated the alleged payment.

Where payment, *sub modo*, of an admitted indebtedness has in fact been made to an agent in such manner that the principal is entitled to affirm or repudiate it upon learning the facts, the statute does not begin to run until the facts are known or the payment disaffirmed. The legal presumption of payment, growing out of the lapse of time which the statute raises, is repelled by the defendant's own showing that the payment relied on was such that the plaintiff had the right to repudiate it when the facts became known to her.

The judgment is reversed, with costs, with directions to the court below to sustain the plaintiff's motion for a new trial.

Filed Nov. 16, 1888.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1888, IN THE SEVENTY-
THIRD YEAR OF THE STATE.

116	169
127	505
116	169
132	317
116	169
134	8
116	169
140	375
141	151
116	169
147	48

No. 13,395.

MCCLURE v. THE STATE.

CRIMINAL LAW.—*New Trial.*—*Certain Causes for to be Sustained by Affidavit.*

—“Newly discovered evidence” and “accident and surprise,” when assigned as causes for a new trial in a criminal case, must be sustained by affidavit showing their truth, the same as when assigned in a civil case.

SAME.—*Affidavits.*—*Making Part of Record.*—*Bill of Exceptions.*—Where there is no reference in the motion for a new trial to any affidavits in support thereof, and affidavits are not filed until after the filing of the motion, they do not constitute a part of the record on appeal to the Supreme Court unless they are made such by a bill of exceptions or by an order of the trial court.

SAME.—*Error Must be Affirmatively Shown.*—*Presumption.*—Unless the record affirmatively shows that a ruling of the trial court was erroneous, it will be presumed that it was right.

From the Knox Circuit Court.

J. S. Pritchett, J. Keith and J. E. Keith, for appellant.

J. C. Adams, Prosecuting Attorney, for the State.

HOWK, C. J.—In this case the indictment charged that the defendant, John McClure, “on the 5th day of June, 1887,

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at the county of Knox, in the State of Indiana, did then and there unlawfully and feloniously make an assault in and upon one Cora Frazo, a female child then and there being under the age of twelve years, to wit, of the age of eleven years, and did then and there unlawfully and feloniously ravish and carnally know her, the said Cora Frazo, contrary to the form of the statute," etc.

On defendant's arraignment and plea of not guilty, the issues joined were tried by a jury, and a verdict was returned finding him guilty as charged in the indictment, and assessing his punishment at imprisonment in the State's prison for the period of eight years. Over his motions for a new trial and in arrest, the court rendered judgment on the verdict.

Errors are assigned here by defendant which call in question the overruling (1) of his motion for a new trial, and (2) of his motion in arrest of judgment.

In the motion for a new trial a number of causes therefor were assigned by defendant; but, in their brief of this cause, his counsel chiefly rely upon the *third* and *fourth* of these causes for the reversal of the judgment below. These causes were assigned as follows:

"3d. Newly discovered evidence, material to this defendant, which he could not, with reasonable diligence, have discovered and produced at the trial of this cause.

"4th. Accident and surprise which ordinary prudence could not have guarded against."

These causes for a new trial, in criminal prosecutions, are specified in the *eighth* and *sixth* clauses of section 1842, R. S. 1881, and are mentioned as causes for granting a new trial in civil actions, in the *seventh* and *third* clauses of section 559, R. S. 1881. As causes for a new trial in civil actions it is provided in section 562, R. S. 1881, that they "must be sustained by affidavit showing their truth;" but, when they are assigned as causes for a new trial in criminal cases, there is no section or clause of our criminal code which, in terms, re-

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quires that they, or either of them, must be sustained by affidavit showing their or its truth.

Sections 559 and 562, *supra*, are almost literal re-enactments of section 352 and 355, respectively, of the civil code of 1852, and have been in force as a part of the law of this State continuously since May 6th, 1853. But section 1842, *supra*, is new legislation, and, in its present form, has been in force only since September 19th, 1881, as a part of our criminal code. It is wholly different in most of its provisions from section 142 of the criminal code of 1852, prescribing the causes for which a new trial should be granted in criminal cases. 2 R. S. 1876, p. 409.

In that section, neither "accident or surprise," nor "newly-discovered evidence," was specified as a cause for which new trials should be granted in criminal cases. In the Revised Statutes of 1881 the criminal code of this State, as it had theretofore existed, was very materially amended and enlarged, so much so that whereas the code of 1852 contained only 173 sections, there are 323 sections in the criminal code of 1881, in force since September 19th, 1881.

In the enactment of section 267 of the criminal code of 1881 (section 1842, *supra*), specifying the causes for which new trials must be granted in criminal cases, the Legislature has increased the number of such causes by adding to those mentioned in section 142, of the criminal code of 1852, all the causes for which new trials may be granted in civil actions, enumerated in section 559, *supra*, except the "fourth, excessive damages," and the "fifth, error in the assessment of the amount of recovery," etc. When the *third* and *seventh* clauses of section 559, *supra*, prescribing causes for new trials in civil actions, were adopted and enacted by the law-making power as the *sixth* and *eighth* clauses of section 1842, *supra*, enumerating the causes for which new trials must be granted in criminal cases, all the laws and usages of this State, statutory or otherwise, relating to pleadings or practice not inconsistent with the provisions of the criminal code

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of 1881, so far as the same might operate in aid thereof or supply any omitted case, were continued in force. Section 1900, R. S. 1881. We do not doubt, therefore, that it was incumbent on the defendant, in the case under consideration, to sustain the *third* and *fourth* causes above quoted, assigned by him in his motion for a new trial, by affidavit showing their truth. It would seem, indeed, that his learned attorneys were of the same opinion, for the clerk of the court below has copied into the transcript now before us a number of affidavits which were apparently filed in support of the motion for a new trial.

But the point is made by the State's attorneys, and, under our decisions, seems to be well made, that, as these affidavits were not made a part of the record either by a bill of exceptions or by an order of court, they can not be considered here in support of defendant's motion for a new trial or for any purpose. There is no reference in the motion for a new trial to any affidavits, and those which the clerk has copied in the transcript were not filed below with the motion, nor until nearly a week after the filing thereof. It may be regarded as settled by our decisions, that such affidavits do not constitute any part of the record on an appeal to this court, either in criminal or civil causes, unless they are made such by a bill of exceptions or by an order of the trial court. Section 650, R. S. 1881; *Fryberger v. Perkins*, 66 Ind. 19; *Williams v. Potter*, 72 Ind. 354; *Powers v. State*, 87 Ind. 144; *Harrison School Tp. v. McGregor*, 96 Ind. 185; *Shields v. McMahan*, 101 Ind. 591; *Kleespies v. State*, 106 Ind. 383.

We are of opinion, therefore, that the questions arising under defendant's motion for a new trial, so ably and elaborately discussed by his counsel, are not so saved in or presented by the record now before us as that they can be considered or decided here. Every presumption is indulged here in favor of the ruling of the trial court, and unless the record affirmatively shows that such ruling was erroneous, we are bound to conclude, as we do in the case in hand, that

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there was no error in the ruling complained of. *Myers v. Murphy*, 60 Ind. 282; *Becknell v. Becknell*, 110 Ind. 42; *Stewart v. State*, 111 Ind. 554; *Whisler v. Lawrence*, 112 Ind. 229; *Kernodle v. Gibson*, 114 Ind. 451.

The error assigned by defendant upon the overruling of his motion in arrest, is not discussed by his counsel. Under the settled practice of this court, the error in such ruling, if any, is thereby waived. But there was no error in the court's refusal to arrest judgment on the verdict. The indictment was sufficient, we think, to withstand a motion to quash, and was clearly good when assailed, as it is, after trial and verdict thereon, only by the motion in arrest.

Upon the evidence, the defendant was rightfully convicted and punished, and the record presents no error which requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Nov. 27, 1888.

No. 13,846.

THE CITY OF RICHMOND v. MULHOLLAND.

MUNICIPAL CORPORATION.—*Negligence.—Defective Street.—Knowledge of Defect.—Contributory Negligence.*—One can not recover for an injury caused by a defective street if he was guilty of negligence contributing to the injury; but mere knowledge on his part that there was a defect in the street does not of itself establish contributory negligence.

From the Wayne Circuit Court.

J. H. Kibbey, for appellant.

T. J. Study and A. C. Lindemuth, for appellee.

116	173
116	463
122	540
116	173
126	82
126	307
116	173
131	141
116	176
132	215
133	344
116	173
143	429
116	173
147	331
116	173
148	174

The City of Richmond v. Mulholland.

ELLIOTT, J.—The appellee recovered damages for personal injuries resulting from a negligent breach of duty on the part of the appellant in failing to keep one of its streets safe for ordinary travel.

The appellant's counsel rests his case upon the proposition that the appellee has no right of action because he was guilty of contributory negligence. If he is right, then the judgment must be reversed.

A municipal corporation is not an insurer of its streets, but it is bound to use ordinary care and diligence to keep them in a reasonably safe condition. The law presumes that this duty has been performed, and every citizen who lawfully uses the streets is entitled to the benefit of this presumption. But while a citizen may use the streets upon the faith of this presumption, still he is bound himself to exercise ordinary care and diligence. The presumption does not entitle him to proceed heedlessly or negligently; on the contrary, the same principle that requires care and diligence on the part of the municipal corporation requires that he shall himself be careful and prudent.

Ordinary care requires that a person should not unnecessarily undertake to pass a place which he knows can not be passed without incurring a hazard that prudent men would not incur. Where the place is known to be so dangerous that it can not be passed without great risk of injury, it is negligence to attempt to pass it. *Lake Shore, etc., R. W. Co. v. Pinchin*, 112 Ind. 592, and cases cited; *Town of Gosport v. Evans*, 112 Ind. 133, and cases cited.

But it is not always that knowledge of a defect in a street can be considered as sufficient of itself to establish contributory negligence. Nor is it true in all cases that knowledge that there is some danger will preclude a recovery. *Lake Shore, etc., R. W. Co. v. Pinchin, supra*; *City of Huntington v. Breen*, 77 Ind. 29; *Murphy v. City of Indianapolis*, 83 Ind. 76; *Nave v. Flack*, 90 Ind. 205 (46 Am. R. 205); *City of Altoona v. Lotz*, 114 Pa. St. 238 (60 Am. R. 346).

Wright, Guardian, v. Moody *et al.*

In the case last named the question was thoroughly discussed, and it was held that knowledge that there was a defect in the street did not of itself establish contributory negligence.

In the case before us the evidence shows that the plaintiff knew that there was an inequality in the center of the street, but it does not show that he knew that it made the center of the street dangerous, nor does it show that he knew that there was any defect at all in the sidewalk near where he was walking after dark at the time he received his injury. It can not, therefore, be declared as matter of law that he was guilty of contributory negligence. As the case comes to us we must regard the question as one of mixed law and fact, and as the jury, under proper instructions from the court, found the fact in favor of the plaintiff, we must sustain the verdict.

Judgment affirmed.

Filed Nov. 26, 1888.

No. 13,407.

WRIGHT, GUARDIAN, v. MOODY ET AL.

REAL ESTATE.—Trust.—Parol Agreement.—Conveyance.—Mrs. M., while married a second time and holding land obtained in virtue of her first marriage, orally agreed with the only child of her first marriage, a daughter, that they should unite in conveying the land to a third person, who should reconvey to the daughter one-fourth of the land, and reconvey the balance to Mrs. M. and her husband, to be by them held in trust and conveyed to Mrs. M.'s three children by her second marriage. A deed absolute in form was executed to Mrs. M. and her husband, and they conveyed the part deeded to them to two of the children in fee, to

116	175
121	930
116	175
125	845
116	175
129	825
116	175
130	954
116	175
134	119
134	584
116	175
137	214
116	175
145	201
116	175
150	301
116	175
153	406
116	175
160	181

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the exclusion of the third. Action by the latter to establish and enforce a trust.

Held, under section 2969, R. S. 1881, that no express trust in the land was created by the parol agreement, nor, upon the facts, can a constructive trust be raised; and as the land belonged to Mrs. M., subject to no valid condition, she had the right to dispose of it as she pleased.

From the Shelby Circuit Court.

T. B. Adams, B. F. Love, L. T. Michener, A. Major and H. C. Morrison, for appellant.

O. J. Glessner and J. Harrison, for appellees.

MITCHELL, J.—This action was brought by George M. Wright, as guardian of William Moody, an insane person, for the purpose of establishing and enforcing an alleged trust, in certain real estate, against Martha Moody and Fanny Walton, who were alleged to be in possession under a deed, claiming to be the owners in fee simple.

It is averred in the complaint that James F. Rule died intestate in the year 1857, the owner of certain real estate in Shelby county, Indiana, and that his widow, Hester A. Rule, and several children survived him as heirs at law, and that all of his children except Mary B., who intermarried with Robert Clark, died before the year 1883. After the death of James F. Rule, certain parcels of the real estate of which her husband died seized, amounting in all to one hundred and eighteen acres, were set off to his widow, Hester A., who subsequently, in the year 1859, intermarried with William Moody. Of this marriage three children were born, viz., William Moody, the plaintiff's ward, Martha Moody, and Fannie Moody, intermarried with Lyman Walton. It is averred in the complaint that, in the year 1883, Hester A. Moody, being still the owner of the land set off to her as the widow of James F. Rule, entered into a verbal contract with Mary B. Clark, her daughter by the first marriage, by the terms of which it was agreed that the real estate so set off to her should be conveyed by "said Hester A. Moody and William Moody, her husband, and said Mary B. Clark

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and Robert M. Clark, her husband, to one James Harrison, in trust, and that one-fourth part in value of said real estate should be reconveyed to said Robert M. Clark and Mary B. Clark by said Harrison, and that the remaining three-fourths part thereof should be reconveyed to said Hester A. Moody and William Moody, her husband, in trust, to be by them conveyed to plaintiff's ward, William Moody, and to Martha Moody and Fannie Walton, in fee, reserving to said Hester A. and William Moody a life-estate therein."

It is averred that a deed was made conveying the land to Harrison, and that the latter conveyed twenty-nine acres thereof, which was estimated to be the one-fourth part in value, to Mary B. and Robert M. Clark, and that the residue was reconveyed, unconditionally and without any declaration of trust, to Hester A. and William Moody.

It is charged in the complaint that Hester A. and William Moody, in disregard of the alleged trust, conveyed the whole of the land, so conveyed to them by Harrison, to Martha Moody and Fannie Walton, who paid no valuable consideration therefor, thereby depriving the plaintiff's insane ward of his share in such lands, and that Hester A. and William Moody, Sr., have since died.

The complaint was held sufficient on demurrer, after which the cause was tried by the court upon issues duly formed, with the result that there was a finding and judgment for the defendants. From the judgment so rendered the guardian prosecutes this appeal, and under the assignment that the court erred in overruling his motion for a new trial, presents a number of questions bringing into review certain rulings of the court concerning the competency of witnesses, and the admissibility of certain evidence offered.

The appellees assign, among other cross-errors, that the court erred in overruling their demurrers to the complaint, thereby presenting as a question whether the facts therein stated are sufficient to constitute a cause of action.

Wright, Guardian, v. Moody *et al.*

It is obvious that the purpose of the suit was to establish an express trust in land in favor of the plaintiff's ward, who is in the fullest sense a volunteer, so far as respects the payment of any valuable consideration.

In view of section 2969, R. S. 1881, which provides that no trust concerning lands, except such as may arise by implication of law, shall be created unless in writing, signed, etc., it can hardly be necessary to say that such a trust, unless declared by a writing duly signed, can not be enforced. It is not pretended that the trust alleged in the complaint under consideration was declared in writing. On the contrary, it is expressly averred that the contract between Hester A. Moody and her daughter, Mary B. Clark, was by parol. The land was held by Mrs. Moody in virtue of her previous marriage with Rule, and having married again, and there being one child, Mrs. Clark, alive by the former marriage, she could not, under the prohibition contained in section 2484, R. S. 1881, alienate, except upon condition that Mrs. Clark should join in the deed.

It was thereupon agreed that the mother and daughter, their respective husbands joining therein, should convey the land to Harrison, upon the trust and condition that he should reconvey one-fourth thereof in value to the daughter and her husband absolutely, and the remaining three-fourths to Mrs. Moody and her husband, to be by them held in trust and conveyed to the plaintiff's ward, William Moody, and to Martha Moody and Fannie, in fee, reserving to Hester A. and William Moody an estate therein for their lives. The conveyance was made to Harrison in pursuance of the agreement, and after conveying twenty-nine acres to Mrs. Clark, the trustee conveyed the residue to Mrs. Moody and her husband by an absolute deed. This vested in the grantees a perfect title to the land reconveyed to them, subject to no restraint or condition, except so far as the oral agreement between Mrs. Moody and her daughter affected it.

This agreement and the alleged trust are clearly within the

Wright, *Guardian, v. Moody et al.*

statute and the numerous decisions of the courts which require express trusts in land to be proved or manifested by writing. The statute is especially applicable in case an executory oral trust is sought to be enforced in favor of a volunteer. *Mescall v. Tully*, 91 Ind. 96, and cases cited; *Dunn v. Dunn*, 82 Ind. 42; *Fouty v. Fouty*, 34 Ind. 433.

If one person, intending to give property to another, vests the property in a trustee, and declares a valid trust upon it in favor of the object of his bounty, the gift is perfected, and the author of the trust loses all dominion over the property, except such as he may have expressly reserved. Where, however, the owner of real estate, without contemporaneously declaring a valid trust, makes a voluntary conveyance to another in pursuance of an oral or imperfect agreement that the latter shall reconvey to the owner, who orally agrees to hold for the benefit of, or to convey to, some third person, upon whom the owner desires to confer the property as a gift, there arises no resulting trust enforceable by the proposed donee. In such a case, until the gift is fully executed and the possession surrendered, the property remains within the direction and under the dominion and control of the beneficial owner.

A court of chancery will not enforce an unexecuted, imperfect trust, in favor of a volunteer. When two persons, for a valuable consideration between themselves, covenant to do some act for the benefit of a volunteer, the latter can not enforce performance of the covenant against the two, although each one might as against the other. *Gaylord v. City of Lafayette*, 115 Ind. 423; *Colyear v. Mulgrave*, 2 Keen, 81; *Gibbs v. Glamis*, 11 Sim. 584; *Garrard v. Lord Lauderdale*, 2 Russ. & M. 451 (3 Sim. 1, and note).

Nor is there any room for the application of the doctrine, sometimes resorted to under peculiar circumstances, for the creation of trusts by equitable construction. The element essential to create a constructive trust is, that fraud, either actual or constructive, must have intervened. Such trusts

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are raised by courts of chancery only in cases where it becomes necessary to prevent a failure of justice, and in most cases where there is no intention or agreement of the parties to create such a relation. *Cox v. Arnsmann*, 76 Ind. 210; *Tinkler v. Swaynie*, 71 Ind. 562; 1 Perry Trusts, section 166: 2 Pom. Eq. Jur., section 1044.

Trusts by equitable construction are not ordinarily decreed, however, in cases where there is an attempt to create a trust by express agreement. Whether or not an express trust is enforceable, depends upon the validity of the agreement.

The supposed trust in the present case is predicated entirely upon an oral agreement alleged to have been made between Mary B. Clark and her mother, in reference to a voluntary disposition of the separate property of the latter. There are no facts alleged which give color to a suggestion that it was inequitable, or a fraud upon any one that the mother should dispose of her own land in any way she saw fit. Whatever motive she may have had in requiring it to be reconveyed by Harrison to herself and husband in fee, and in then conveying the fee to the two daughters to the exclusion of the plaintiff's ward, forms no proper subject for inquiry here. It is enough to know that, after the conveyance from Harrison, it was her property, and that the law vested in her the right to dispose of it in any manner she pleased, so long as the purpose for which it was conveyed was not immoral, nor opposed to the policy of the law.

The conclusion at which we have arrived is, that the complaint does not state facts sufficient to constitute a cause of action.

As the judgment was in favor of the defendants on the merits, the conclusion already arrived at renders it immaterial that we consider the errors assigned by the appellant, as in any event there could be no reversal of the judgment.

The judgment is affirmed, with costs.

Filed Nov. 26, 1888.

Wagner v. The State.

No. 14,600.

WAGNER v. THE STATE.

116	181
164	131
116	181
166	36

CRIMINAL LAW.—Witness.—Contradictory Statements.—Impeachment.—A witness can be impeached by statements made out of court only when such statements are contradictory of his testimony.

SAME.—Reconcilable Statements.—A statement out of court that at the time he shot the witness the accused "was crazed from the use of liquor, and from the trouble on his mind," is not necessarily contradictory of a statement in court that the accused was sober when he did the shooting.

SAME.—Intoxication.—Insanity.—Delirium Tremens.—Instructions to Jury.—Voluntary intoxication existing at the time a crime is committed is not available as an excuse or defence in a prosecution by the State. For instructions to the jury upon the subject of insanity and delirium tremens caused by the use of intoxicating liquor, see opinion.

SAME.—Medical Experts.—Opinions.—Instruction.—Province of Jury.—An instruction that the opinions of medical experts are to be considered by the jury in connection with all the other evidence in the case; that they are not bound to act upon them to the exclusion of other testimony; and that, giving such opinions their proper weight, they are to determine for themselves, from the whole evidence, whether or not the defendant was of sound mind, is not erroneous as invading the province of the jury or discrediting the testimony of the experts.

From the Marion Criminal Court.

J. S. Duncan, C. W. Smith and J. R. Wilson, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

ZOLLARS, J.—Appellant was convicted and sentenced to the State's prison for a term of five years, upon a charge of assault and battery with intent to kill. It is insisted on his part that the judgment should be reversed because of alleged errors of the court below in excluding certain evidence, and in giving certain instructions.

Insanity was the defence, and the only defence, relied upon by appellant.

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The evidence shows, without any contradiction, that some time prior to the assault, appellant had a wife and child, a daughter, with whom he lived, a short distance from the house in which lived a lewd woman, who went by the name of Frankie Howe; that he neglected his wife and child, and spent most of his time, and especially his nights, in the company and in the embraces of the Howe woman; that the illicit intercourse continued until he wholly abandoned his wife and child, and, urged forward by the evil spirit which is sure to possess and control any one who neglects and abandons wife, children and home for the haunts of the vile and wicked, he finally proposed to get a divorce from his wife and marry the Howe woman; that, enraged by jealousy and her refusal to marry him, he called at the house where she lived and attempted to kill her; that one ball discharged from his revolver passed through her body; that after she fell upon the floor another ball discharged from his revolver struck her in the lower limb, and passing upward broke the bone above the knee; that another ball inflicted a flesh wound upon her abdomen, and that the last ball in the revolver was discharged and missed her. She did not die from the effects of the wounds, but is a cripple for life.

The theory of the defence was, and is, that appellant was insane from the excessive use of intoxicating liquors.

In her examination in chief, the woman, Frankie Howe, stated that appellant was sober when he shot her.

For the purpose of laying the foundation for an impeachment, counsel for appellant asked her this question, upon cross-examination: "When he visited you in company with Mr. Herod, I will ask you if you did not say to Mr. Herod that it was not John Wagner who shot you; that it was a drunken, crazy man?" Having answered that she did not think she had made such a statement, the same counsel propounded this question, "and that he would not have shot you if he had not been crazy?" Having answered again that she did not recollect of having stated anything of the

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kind, counsel propounded this further question: "You did not say that in the presence of Mr. Herod?" To that question she answered, "I don't think I did."

Mr. Herod was called as a witness by appellant, and, having testified that on one occasion subsequent to the shooting, and in company with appellant, he had visited her as her attorney, appellant's attorney asked him this question:

"I will ask you to state if at the time you called, as you have described, Frankie Howe said to you, in substance, that it was not John Wagner who shot her"—The witness, interrupting, said: "I can say now, she did not say it to me; it was said in my hearing."

Counsel, continuing, finished the question as follows: "That it was a crazy man who was crazed from the use of liquor and from trouble that he had on his mind at the time."

Mr. Herod closed his answer by saying that all he had heard her say was by reason of his being present as her attorney "relating to this matter."

Insisting that he could make no further statement without violating his obligation as an attorney to his client, he declined to answer. The court refused to require a further answer. Appellant excepted, assigned the refusal of the court as a cause for a new trial, and here insists that the court erred.

The statement by Mr. Herod that "she did not say it to me; it was said in my hearing," amounted to an answer that Frankie Howe had stated that it was not John Wagner who shot her.

That statement, while a partial answer to the question propounded, was not, of itself, important, because there is no claim that appellant did not shoot her. It could only be important, if at all, in connection with the balance of the statement which, by the questions to her and to Mr. Herod, it was assumed she made.

What appellant was seeking to do was to impeach her by showing that she had made statements out of court contra-

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dictory of her statement upon the witness stand that he was sober at the time he shot her. That statement, it will be observed, did not amount to a statement that he was not an habitual drunkard, nor that he was not insane as the result of the excessive use of intoxicating liquors. It was simply that he was sober.

Under some of the authorities, it may be a question as to whether the simple fact of his being intoxicated or sober at the time he did the shooting was in any way material.

We do not think it necessary to decide that question here, and, therefore, we leave it where it has been left by our cases. Assuming, for the purposes of this opinion, that it was material, the rule is well settled that a witness can be impeached by statements made out of court only when those statements are contradictory of his statements upon the witness-stand. If the two statements are consistent and reconcilable with each other, the statement made out of court will not be received to impeach the witness. 1 Wharton Evidence, section 558.

In this case, the statement which it is claimed Frankie Howe made in the hearing of her attorney, Mr. Herod, is not necessarily contradictory of her statement in court. Appellant might have been insane from the habitual use of intoxicating liquors, and yet have been sober when he did the shooting.

As expressed in the question to Mr. Herod, appellant, at the time of the shooting, might have been a crazy man, who was crazed from the use of liquor, and from the trouble he had on his mind at the time, and yet have been sober at that time, as stated by Frankie Howe in court.

There is another objection, urged by counsel for the State, to the impeaching question propounded to Mr. Herod, which is not without weight, and that is, that by that question appellant sought to prove what amounted to an expression of a mere opinion by Frankie Howe, as to the mental condition of appellant, to contradict her statement in court that he was

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sober when he did the shooting. See *Rucker v. Beaty*, 3 Ind. 70; 1 Wharton Evidence, section 551. See, also, *Warner v. State*, 114 Ind. 137.

Counsel for appellant contend that Mr. Herod should not have been excused from answering, by reason of having been the attorney for Frankie Howe, inasmuch as appellant was present, and was really the person to whom she addressed her conversation. Counsel for the State argue to the contrary.

The conclusions already stated, and our conclusion upon the whole case, render it unnecessary for us to decide the point in controversy last above stated. Whatever view might be taken of that question, we are clear that it should not be regarded as of sufficient consequence to require a reversal of the judgment.

Appellant's sentence is five years in the State's prison. Under the statute it might have been fourteen years. Keeping in view the length of the sentence, and all of the facts in the case as shown by the evidence, we regard this as a case in which our statute should be applied, which provides that "In the consideration of the questions which are presented upon an appeal (in criminal cases), the Supreme Court shall disregard technical errors or defects or exceptions to any decision or action of the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant." R. S. 1881, section 1891.

The evidence shows not only depravity on the part of appellant, and a determined effort by him to kill the woman with whom he had maintained the unlawful and lewd relation, but also, that at the time he attempted to kill her he had no such mental infirmity as ought to exonerate him from the consequences of his acts. His moral sense was blunted, as his conduct shows, but that was more the result of vicious habits than of mental condition.

Appellant offered to read in evidence a letter which he had received from Frankie Howe, for the purpose, as stated by counsel in argument, of showing the intimate relations

which had existed between her and appellant, and thus showing the improbability of an attempt by him to kill her, unless he was insane.

The exclusion of the letter by the court involved no error for which the judgment should be reversed.

The undisputed testimony of Frankie Howe, upon that branch of the case, showed very fully the relations which had existed between her and appellant prior to the shooting.

The eleventh instruction given by the court is as follows: "Mental incapacity produced by voluntary intoxication, existing only temporarily, but at the time of the commission of the offence, is no excuse for crime, nor a defence to a prosecution therefor. But where the habit of intoxication, though voluntary, has been long continued, and has produced disease which has perverted or destroyed the mental faculties of the accused so that he was incapable at the time of the commission of the alleged crime, on account of the disease, of acting from motive, or of distinguishing right from wrong, in short, insane, he will not be held accountable for the act charged as a crime committed while in such condition."

We give attention to so much of the instruction as is objected to by appellant, and limit our observations to the objections urged. His counsel contend that, by the first portion of the charge, the court instructed the jury that if a person's mind is rendered unsound by voluntary intoxication, such unsoundness will not constitute an excuse, or a defence to a charge of crime, unless it was caused by intoxication long continued. We think that counsel put a strained and incorrect construction upon the charge. The instruction is not couched in the most specific and appropriate language, but, evidently, what the court intended, and what the jury doubtless understood the instruction to mean, was, that voluntary intoxication existing at the time a crime is committed will not be available as an excuse or defence in a prosecution by the State. But if it should be conceded that

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the construction contended for by counsel is the correct one, and that that portion of the instruction was erroneous, we are unable to discover in what way it could have injured appellant. The proof is conclusive that at the time he did the shooting he was not in such a condition of intoxication as that his knowledge of right and wrong was affected thereby. Indeed, the proof is quite conclusive that he was sober.

The evidence shows that for quite a long time he had been an habitual drinker of intoxicating liquors, and in the habit of becoming intoxicated; and there is testimony tending to show that the intoxication thus continued had, to some extent, affected his mind, although upon that point the testimony is conflicting.

The latter part of the instruction was applicable to the case as made by the testimony adduced by appellant, and of that portion no complaint is made.

The thirteenth instruction given by the court, to which appellant objected, and still objects, was as follows:

“Insanity of a permanent nature, when once shown to exist, is presumed to continue until the contrary appears; but where delirium tremens is set up as a defence, the delirium must exist at the time the act was committed, as there is no presumption of its existence from antecedent fits from which the party has recovered, for this is a mere transient derangement of the mind, and there is no presumption of its recurrence or continuance.”

With the exception of the last two sentences, the foregoing is a literal copy of an instruction approved in the case of *Goodwin v. State*, 96 Ind. 550 (560).

Appellant's counsel contend that it was not correct as applied to this case, for the reason that one of the physicians called by the defence testified that frequent attacks of delirium tremens would have the effect of weakening the mind. That testimony did not, in our judgment, render the instruction inapplicable, nor so erroneous as to require a reversal of the judgment.

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If the testimony was such as to convince the jury that appellant's mind had been in any way affected and weakened by attacks of delirium tremens, they were instructed, by the former part of the charge, that the weakened condition, once shown, would be presumed to continue. The latter part of the instruction had reference alone to fits of delirium tremens, and not to a weakened condition of the mind caused by a recurrence of such fits.

It is claimed by counsel for appellant that by the fourteenth instruction the court invaded the province of the jury, and threw discredit upon the testimony of the medical experts. The instruction was as follows :

"The opinions of medical experts are to be considered by you, in connection with all the other evidence in the cause ; but you are not bound to act upon them to the entire exclusion of other testimony. Taking into consideration these opinions, and giving them just and proper weight, you are to determine for yourselves, from the whole evidence, whether the defendant was, or was not, of sound mind, giving him the benefit of a reasonable doubt, if any such arises from the evidence."

We are unable to see in what respect that instruction invaded the province of the jury, or threw discredit upon the testimony of the expert witnesses.

It seems to us that if the instruction was faulty at all, the complaint should come from the State. Such a fault, if any, could by no possibility affect appellant injuriously.

It is not necessary, however, to extend the discussion of that instruction, as it seems to have been copied from an instruction also approved in the case of *Goodwin v. State*, *supra* (561).

We have thus followed the arguments of counsel with care, and are convinced that the record presents no error for which the judgment should be reversed.

Judgment affirmed.

Filed Nov. 26, 1888.

Fleenor et al. v. Taggart.

No. 13,403.

116	180
120	547

FLEENOR ET AL. v. TAGGART.

JUDGMENT.—*Upon Official Bond.*—*Lien upon Real Estate from Commencement of Action.*—*Surety.*—Under section 609, R. S. 1881, judgments on bonds payable to the State bind the real estate of the debtor from the commencement of the action. A surety in an official bond is a debtor within the meaning of this statute.

SAME.—*Complaint.*—*Amendment by Filing New Pleading.*—A complaint upon a county treasurer's bond was filed in 1872, upon the relation of the board of commissioners and the county auditor, and a judgment was obtained. Upon appeal the judgment was reversed, and in 1875 a new complaint, containing an additional paragraph, was filed, it being founded upon the same cause of action. The board of commissioners was omitted as a relator, it having been held that it was improperly joined.

Held, that the new complaint was merely an amendment of the original pleading, and not the commencement of a new action, and that a judgment obtained thereon bound the real estate of a surety in the bond from the time the original complaint was filed.

PLEADING.—*Amendment of Complaint.*—*Relating Back.*—*General Rule.*—An amendment of a complaint relates back to the time at which the pleading was filed, except where the amendment sets up a claim or title not previously asserted, and involving the statute of limitations.

From the Brown Circuit Court.

J. H. Loudon and *R. W. Miers*, for appellants.

W. C. Duncan and *R. L. Duncan*, for appellee.

NIBLACK, J.—The complaint in this case averred that, in the year 1870, one William H. Taggart was elected treasurer of Brown county, and became duly qualified as such by, amongst other things, executing an official bond, with one Milton Fleenor as one of his sureties; that afterwards a large amount of money came into his, the said William H. Taggart's hands, as such treasurer, which he converted to his own use; that, on the 13th day of November, 1872, an action was commenced, in the name of the State, on the re-

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lation of the board of commissioners of the county of Brown, and also the relation of the auditor of that county, in the court of common pleas of said county of Brown, against the said Taggart and his sureties on his official bond; that subsequently a judgment was rendered in the action in that court against Taggart and his sureties for the sum of \$2,612.07; that this judgment was afterwards, on the 30th day of April, 1875, reversed by this court, the holding being, amongst other things, that the board of commissioners was not a proper relator in the cause; that, after the cause was remanded, a new complaint was filed in the name of the State, on the relation of the auditor of Brown county, founded upon the same cause of action, but including some other items of indebtedness, and containing an additional paragraph, such new complaint being denominated an amended complaint; that said amended complaint was filed on the 1st day of June, 1875, after which the venue of the cause was changed to the Bartholomew Circuit Court; that, on the 9th day of August, 1877, a judgment was rendered in the cause in that court against the said Milton Fleenor and the other defendants, for the sum of \$6,500; that there was nothing in the judgment indicating the time at which the complaint was filed, or when the suit was commenced, or declaring that a lien attached to the real estate of the defendants at the time of the commencement of the suit; that, in February, 1885, the clerk of the Bartholomew Circuit Court issued an execution on such judgment and placed the same in the hands of the defendant, Thomas J. Taggart, who was the sheriff of said county of Brown; that said Taggart, as such sheriff, had levied said execution on a certain particularly described tract of land in said county, and had advertised the same for sale to satisfy such execution; that, on the 6th day of April, 1875, which was before the new, or amended complaint was filed as stated, the said Milton Fleenor, for a valuable consideration, sold, and by warranty deed conveyed, the real estate so levied upon to one Joseph Fleenor, which

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deed was duly recorded on the 7th day of the same month; that, on the 13th day of July, 1881, the said Joseph Fleenor sold and conveyed said real estate to one Eliza Fleenor; that the said Eliza died testate in August, 1884, having first devised such real estate to the plaintiffs, Joseph N. Fleenor and James P. Fleenor; that the will of the said Eliza, by which said real estate was so devised, was soon thereafter admitted to probate; that since the death of the said Eliza the plaintiffs have been in the possession of the real estate under the will; that unless the said Taggart should be restrained from selling such real estate on the execution in his hands, a cloud would be cast on the title of the plaintiffs thereto. Wherefore an injunction prohibiting such sale was requested.

A demurrer was sustained to the complaint, and the defendant had final judgment upon demurrer.

Section 609, R. S. 1881, provides that "Judgments on bonds payable to the State of Indiana shall bind the real estate of the debtor from the commencement of the action," and this provision was in force when the bond in suit was executed and when, in any view of the case, this action was commenced.

In the case of *Shane v. Francis*, 30 Ind. 92, it was held that a surety upon an official bond was a debtor within the meaning of this section.

This complaint was filed, and this appeal is prosecuted, upon the theory that the action upon which the judgment appealed from was rendered was really commenced on the 1st day of June, 1875, when the new or amended complaint was filed.

As has been made to appear, the action upon the original complaint was commenced on the 13th day of November, 1872, and this original complaint was afterwards, on the 1st day of June, 1875, superseded by the filing of a new complaint upon the same cause of action, with the name of one of the relators omitted, and containing an additional para-

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graph, the character of which is not shown. The reasonable presumption, however, is that this additional paragraph was either germane to, or was founded upon, the same cause of action, and we are justified in so assuming.

A complaint, or other pleading, may be amended: *First.* By a new pleading. *Second.* By filing an additional paragraph. *Third.* By interlineation or mutilation. 1 Works Pr., section 696.

The new complaint, filed as above, was therefore nothing more than an amendment of the original complaint, and hence not the commencement of a new action.

In the case of *School Town of Monticello v. Grant*, 104 Ind. 168, it was said that, as a rule, an amendment of a complaint relates back to the time at which the pleading was filed, and that it is only where the amendment sets up some claim or title not previously asserted, and involving the statute of limitations, that a different rule applies. As to when such a different rule may apply, see the case of *Lagow v. Neilson*, 10 Ind. 183.

The new complaint under consideration set up no new cause of action, and no new matter involving the statute of limitations. It consequently related back to the time of the filing of the original complaint, and became simply an amended complaint, taking the place of the one first filed, and performing the office which the original complaint was designed to perform.

The omission of the name of the board of commissioners as a relator in the new complaint did not change the nature of the action or the purpose had in view in prosecuting it. It made the county auditor the only relator in the cause, as he ought to have been in the first instance, and continued the suit for the benefit of the county represented by the board.

The judgment is affirmed, with costs.

Filed Nov. 26, 1888.

The Louisville, New Albany and Chicago Railway Co. v. Hubbard.

No. 12,515.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. HUBBARD.

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194	514
116	193
182	530
183	159
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165	629

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PLEADING.—*Additional Pleadings.*—*Opening Issues.*—*Discretion of Court.*—
The party who assails the refusal of the trial court to open the issues
in a cause to admit the filing of additional pleadings, must affirmatively
show an abuse of discretion.

DEPOSITION.—*Producing Witness in Court.*—Where a deposition is prop-
erly taken, it may be read in evidence unless the witness is produced in
court at the time the deposition is read. Section 425, R. S. 1881.

INSTRUCTION TO JURY.—*Refusal to Give After Indicating that it will be Given.*
—The court may refuse an instruction, if satisfied that it is erroneous,
although it may have previously indicated that it would be given.

CONTRACT.—*Personal Services.*—*Compensation.*—*Benefit Received by Third Per-
son.*—Where a plaintiff renders services at the request of the defendant,
his right to compensation is not affected by a contract between the de-
fendant and a third person, of which he had no knowledge, nor by the
fact that the third person, and not the defendant, received the benefit.

SAME.—*Implied Promise to Pay.*—*Quantum Valebat.*—Where one renders
services at the instance of another, without any specific compensation
being agreed upon, the law implies a promise on the part of the latter
to pay the reasonable value of the services.

SAME.—*Payment.*—*Receipt.*—*Evidence.*—A receipt for services under one
contract is not evidence of payment under another and distinct con-
tract.

SAME.—*Estimating Compensation.*—*Responsibility of Service.*—In estimating
compensation for services it is proper for the jury to consider the re-
sponsibility entailed upon the plaintiff by being made the custodian of
valuable property.

INTERROGATORIES TO JURY.—*Rejection.*—Interrogatories to the jury may
be submitted only when they call for a finding upon material and sub-
stantive facts. Interrogatories calling for a finding upon items of evi-
dence should be rejected.

EVIDENCE.—*Demand in Former Complaint.*—*Admission.*—The demand made
in the complaint in a former action is competent as an admission, but it
is not conclusive upon the plaintiff.

JUDGMENT.—*Void for Want of Jurisdiction.*—*Not Conclusive upon Either*

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Party.—A judgment in a former action, which is void for the want of jurisdiction, does not conclude either of the parties.

From the Carroll Circuit Court.

G. W. Friedley, G. W. Easley and W. H. Russell, for appellant.

L. B. Sims, G. R. Eldridge and J. L. Sims, for appellee.

ELLIOTT, J.—The first paragraph of the appellee's complaint was, by the instruction of the trial court, withdrawn from the jury, and the case, therefore, stands upon the second paragraph. That paragraph is a demand of compensation for services performed for the appellant, at its request, by the appellee.

The cause had been at issue for four months when the appellant asked leave to file an amended answer. We can not say from the record that the trial court abused its discretion in refusing permission to open the issues. It devolves upon the party who assails the refusal of the court to open the issues to admit the filing of additional pleadings, to affirmatively show an abuse of discretion, and as none is here satisfactorily shown, we must uphold the decision of the trial court.

The court permitted the appellee to read in evidence the deposition of W. A. Hubbard, who was shown to have been in court during the trial and until noon of the day in which his deposition was read. It is not shown, however, that he was "produced in court at the time the deposition was read to the jury." For anything that appears, it may not have been in the power of the appellee to produce him in court, and as the presumption is in favor of the ruling of the trial court we must hold that error does not affirmatively appear. The record shows that Hubbard lived in Marion county, and it was, therefore, proper to take and to read his deposition. The appellee could not have compelled him to remain in attendance, and, consequently, could not be deprived of his testimony, unless some wrong or fault on his part was shown,

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and nothing of that kind is disclosed by the record. Where a deposition is properly taken, it may be read in evidence unless "the witness is produced in court," for so the statute expressly declares. R. S. 1881, section 425.

The court may refuse an instruction, if satisfied that it is erroneous, although it may have previously indicated that it would be given. *City of Logansport v. Dykeman*, ante, p. 15.

We think it clear that a court, after the discovery of an error, may justly correct it. Of course, an instruction once approved should not be withdrawn unless there is a valid and substantial reason for withdrawing it, but, nevertheless, an error may be rectified at any time before the verdict is returned. *Farley v. State*, 57 Ind. 331.

Where a plaintiff renders services at the request of the defendant, his right to compensation is not affected by a contract with a third person of which he had no knowledge. Nor is his right to compensation affected by the fact that the third person received the benefit, and not the defendant. It was, therefore, proper for the court to refuse the instruction asked by the appellant concerning the contract between Yeoman and the appellant, for that contract did not impair the rights of the appellee.

The evidence shows that the services for which the appellee asks compensation were rendered upon the request of the appellant. There is, consequently, no question as to the right of a mere trustee to recover compensation from the creator of a trust. The case is the simple and ordinary one of a plaintiff rendering service at the instance of a defendant without any specific compensation being agreed upon. As every one knows, the law implies a promise on the part of the defendant in such cases to pay the plaintiff the reasonable value of his services.

The second instruction asked by the appellant was properly refused, because the claim of the plaintiff was not for services rendered under the contract with Yeoman, dated February 28th, 1880, but for services under a different con-

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tract. A receipt for services under one contract is not evidence of payment under a contract distinct and different from the one to which the receipt refers. In this case Hubbard's receipt refers specifically to services as trustee under the contract with Yeoman, and does not extend to any other.

It was proper for the court to instruct the jury that in estimating the appellee's compensation they might take into consideration the responsibility entailed upon the appellee by being made the custodian of the bonds placed in his possession. The value of property entrusted to a party's custody is a proper element for consideration in fixing his compensation. It is but right that compensation should bear a just relation to the degree of responsibility incurred.

The error, if there was error, in refusing the tenth instruction asked by the appellant, was cured by the remittitur of one thousand dollars entered by the appellee.

What we have said disposes of all the questions arising upon the rulings on the instructions, and we deem it unnecessary to notice them in full detail.

Forty-seven interrogatories were asked by the appellant, and of these twenty-six were given and twenty-one were refused. We hold that the court did not err in rejecting these interrogatories. The law does not mean that interrogatories shall be submitted calling for a finding upon mere items of evidence, for, if this were the intention of the statute, it would be in the power of the parties to compel the jury to rehearse the entire evidence. What the statute declares and intends is, that the jury may be required to find material and substantive facts. *Trentman v. Wiley*, 85 Ind. 33; *Atchison, etc., R. R. Co. v. Plunkett*, 25 Kans. 188; *Dubois v. Campau*, 28 Mich. 304; *Louisville, etc., R. W. Co. v. Pedigo*, 108 Ind. 481; *Miner v. Vedder* (Mich.), 33 N. W. Rep. 47.

In this case the interrogatories given to the jury fully covered all the controlling questions of fact, and it was entirely proper to refuse those which were disapproved. It is, indeed, the duty of the court not to permit the jury to be em-

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barrassed and confused by a great number of interrogatories. The interrogatories should be clear and as few in number as will elicit the material facts.

There is evidence fully sustaining the verdict of the jury, and we can not disturb it.

It is insisted that the amount of the recovery assessed by the jury is excessive, and the principal reason assigned in support of this contention is, that in a former action brought by the appellee he only claimed two thousand dollars. The reason adduced by counsel is not sufficient to support his position. The complaint and demand in the former case were competent as admissions, but they did not conclude the appellee. *Boots v. Canine*, 94 Ind. 408; *Baltimore, etc., R. W. Co. v. Evarts*, 112 Ind. 533, and authorities cited.

As the judgment in the former action was absolutely void for the want of jurisdiction, it did not conclude either of the parties. *Curtis v. Gooding*, 99 Ind. 45, and authorities cited.

The utmost force that can be attributed to the complaint and judgment in the nugatory action of the appellee is, that they constitute a very strong admission, but beyond this they have no force. The fact that the appellee at one time was willing to accept two thousand dollars is not conclusive evidence that his services were not worth \$3,114, the amount awarded him by the judgment of the court. *Miller v. Beal*, 26 Ind. 234.

Judgment affirmed.

Filed Nov. 27, 1888.

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150	455

No. 13,333.

HALL v. DURHAM.

JUDGMENT.—*By Default.*—*Complaint for Relief from.*—*Sufficiency of.*—A complaint under section 396, R. S. 1881, to be relieved from a judgment alleged to have been taken through mistake, inadvertence, etc., is bad if it fails to show the nature of the cause of action on which the judgment was rendered, and such pertinent facts as make it reasonably clear that the defendant had and has a meritorious defence thereto.

From the Montgomery Circuit Court.

M. E. Clodfelter, T. E. Ballard and E. E. Ballard, for appellant.

J. R. Courtney, for appellee.

MITCHELL, J.—This was an application by the appellant, Margery Hall, under section 396, R. S. 1881, to be relieved from a judgment alleged to have been taken against her through mistake, inadvertence, surprise, and excusable neglect, in favor of William H. Durham.

The complaint does not disclose, except possibly by inference, what the nature of the action was which resulted in the judgment from which relief is prayed.

It is alleged that a judgment was taken by default against the plaintiff and her husband, John R. Hall, at the February term, 1885, of the Montgomery Circuit Court, quieting the title in Durham to a certain described tract of land in Montgomery county, of which the appellant avers "she was the owner in equity," the same having been "purchased with her money, and the legal title thereto taken in the name of her husband and co-defendant, John R. Hall, without her knowledge and consent."

The only other averments which give any clue to the nature of the original action are the following: "That the only claim of title to or interest in said real estate that plaintiff

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had at that time, or now has, is based upon unfounded and fraudulent tax liens and tax titles," etc.

It is open to conjecture that the appellee had at some time purchased the land at a tax sale, and that he had in due course of time received a deed for the land, and had brought suit to quiet his title thus derived. We might suppose that this was the nature of the action in which the judgment was taken by default, but one who asks to be relieved from a judgment taken by default must not leave the nature of the action to mere supposition. Until the complaint to set aside a default shows the nature of the original cause of action on which the judgment was entered, and such pertinent facts as make it reasonably clear that the defendant had and has a meritorious defence thereto, the court can not interfere. *Lee v. Basey*, 85 Ind. 543; *Wills v. Browning*, 96 Ind. 149.

If we were to assume that the complaint in the original action was to quiet the complainant's title, which he was asserting through a tax sale, it would be important to know when and under what law the sale was made, and whether or not the purchaser has had possession of the land under a deed.

A purchaser in possession of land, purchased at a tax sale, for the statutory period, may be entitled to invoke the aid of a court to quiet his title, even though the sale may have been invalid and void.

The complaint, upon any supposable hypothesis, comes far short of stating facts showing a meritorious defence, but we do not examine it further, as, without knowing what the nature of the original action was, we can not determine with any certainty whether the facts stated constituted a defence or not.

The judgment is affirmed, with costs.

Filed Oct. 12, 1888; petition for a rehearing overruled Nov. 27, 1888.

116 300
 121 356
 116 286
 121 176
 121 979

No. 14,142.

SCHILLING v. THE STATE.

INTOXICATING LIQUOR.—*License.*—*Sale from Wagon in Public Highway.*—An indictment charging the defendant with the offence of selling intoxicating liquors without a license, to be drank in and about his house, as such offence is defined in section 5320, R. S. 1881, is not supported by proof that the sale was made from an open wagon standing upon a public highway, in a county different from that in which the defendant lived and did business.

SAME.—*"House" Defined.*—*A Wagon not a House.*—An open wagon is in no sense a house, within the meaning of the statute, as a house must be some sort of a building or enclosed structure.

SAME.—*Construction of Statute.*—When the Legislature uses specific terms as to place, the courts must enforce the statute according to its terms, and can not, by judicial construction, supply legislative omissions.

From the Montgomery Circuit Court.

J. F. McHugh, for appellant.

L. T. Michener, Attorney General, and *A. B. Anderson*, Prosecuting Attorney, for the State.

ZOLLARS, J.—Appellant was convicted upon a charge of having unlawfully sold intoxicating liquors without a license, to be drank in and about his house, where the same were sold. The prosecution is based upon section 5320, R. S. 1881, which provides that "Any person, not being licensed according to the provisions of this act, who shall sell or barter, directly or indirectly, any spirituous, vinous, or malt liquors in a less quantity than a quart at a time, or who shall sell or barter any spirituous, vinous, or malt liquors to be drank, or suffered to be drank in his house, out-house, yard, garden, or the appurtenances thereto belonging, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined," etc.

That section very clearly, as has been ruled by this court, creates two offences. The first consists in selling less than a

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quart at a time without a license. The second consists in selling any quantity, without a license, to be drank in the seller's house, out-house, yard, garden or the appurtenances thereto belonging. The indictment was intended as a charge of this last offence, and upon that appellant was convicted.

In construing the above section, this court, in the case of *Burke v. State*, 52 Ind. 522, said: "In an indictment for selling in a less quantity than a quart at a time, without a license, there should be no reference, either in the body of the indictment or in the negative averments, to the place where the liquor was sold or where it was drank. Under the second clause of section 12, *supra* (section 5320, R. S. 1881, *supra*), the place where the liquor was sold to be drank, or was suffered to be drank, becomes important. There are five places specified: 1. His house. 2. His out-house. 3. His yard. 4. His garden. 5. The appurtenances thereto belonging. If the liquor is sold to be drank, or is suffered to be drank, in his house, the indictment should so aver, and so with each of the other places named," etc. To the same effect see *State v. Corll*, 73 Ind. 535; *Schlicht v. State*, 56 Ind. 173.

In the case last above cited, in speaking of the above section of the statute, it was said: "It will be observed, however, that, in the first of these two offences, it was the sale, without license, of a quantity less than a quart, which constitutes the offence, without any reference to the place where it may be drank, while, as to the second of said two offences, the quantity sold, whether a gill or a barrel, is wholly immaterial, but the offence lies chiefly in the place where it is drank, or suffered to be drank." See, also, *Plunkett v. State*, 69 Ind. 68; *Burke v. State*, 52 Ind. 461.

These rulings, that in the second offence created by the above section of the statute the place where the liquor sold is to be drank, or is suffered to be drank, is an essential element of the crime, are in harmony with well settled principles and the rulings of the courts upon similar statutes.

In the first place, statutes which deprive men of property

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or liberty, and bring them into disgrace, while given a reasonable construction so as to arrive at and carry out the intent of the law-makers, are yet construed strictly. If, upon such construction, there is doubt as to the meaning of a statute, the doubt will prevail in favor of the accused. Bishop Stat. Crimes, sections 119, 194, 218, 230, 232; *Kent v. State*, 8 Blackf. 163; *Steel v. State*, 26 Ind. 82; *United States v. Wigglesworth*, 2 Story, 369.

“ It being forbidden to set up a faro-table ‘ in any dwelling-house, out-house, or place occupied by any tavern-keeper, retailer of wine, spirituous liquors, beer or cider,’ one in a locality not in terms mentioned—as, for instance, in a house used solely for this purpose—was held not to be prohibited.” Bishop Stat. Crimes, section 221, citing *Baker v. State*, 2 Harris & J. 5.

A statute of North Carolina made it unlawful for any one to construct, erect, keep up or use any *public* gaming table or place where games of chance should be played, etc. It was held in the case of *State v. Langford*, 3 Ired. (N. C.), 354, that an indictment charging the defendant with having played a game of chance was bad because it did not charge him with doing the act at a public gaming place. See, also, *State v. Ferguson*, 33 N. H. 424.

By a statute of 1847 (Acts 1847, p. 58) it was made illegal for any one to erect and maintain, etc., any booth, tent, wagon, huckster-shop, or other place, for the sale of intoxicating liquors, etc., and to sell such liquors at such places, etc., within two miles of any collection of any portion of any citizens of the State for the purpose of public worship. It was held by this court that an indictment for selling liquor in violation of that statute, which made a general charge of selling liquor within two miles of such meeting, and did not charge that it was sold at such booth, tent, wagon, huckster-shop, etc., was insufficient.

That ruling was made in the case of *Bouser v. State*, Smith (Ind.) 408, a case which is not reported in the regular set

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of Reports, but is found in a volume of decisions reported by Hon. THOMAS L. SMITH, one of the judges of this court at the time the decision was made.

We still have a statute which makes it unlawful to sell or give away intoxicating liquors, or to erect and maintain, etc., booths, wagons, etc., for the sale of such liquors within one mile from the place where people are gathered for public worship, or where an agricultural fair or exhibition is being held. Section 2100, R. S. 1881. That section, although upon the same subject, is different in terms from the former statute.

It may be violated by the giving away or sale of liquor, although the gift or sale may not be at such booth, wagon, etc.

If section 5320, involved here, were in such general terms as that section, this case would be relieved of all difficulty. It would then be immaterial whether appellant sold intoxicating liquor at his house or from a wagon in the country, and upon a public highway, or whether the liquor was sold "to be drank, or suffered to be drank," in his house or upon a public highway.

These references to the act of 1847, and the ruling upon it, and to the act of 1881, *supra*, upon the same subject, are intended to serve no purpose here except to show that when the Legislature uses specific terms as to place, the courts must enforce the statute according to its terms, and can not, by judicial construction, supply legislative omissions; and to show, to some extent, at least, that when the Legislature does not intend to connect any particular place with the offence created, so as to make it an essential element of such offence, general terms are used.

The arguments of counsel for the State are not necessarily antagonistic to anything we have stated thus far. Their position is, that the evidence shows that without a license appellant sold intoxicating liquors "to be drank, and suffered to be drank, in and about his house," as charged in the indictment.

Schilling v. The State.

The facts as shown by the evidence are, in brief, these: On the 25th day of August, 1887, there was an old settlers' meeting at Mehary's Grove, in Montgomery county. Prior to, and at that time, appellant lived in Lafayette, in Tippecanoe county, and was engaged in the grocery and beer business. On that day, having put upon his open delivery wagon several kegs of beer, he drove into Montgomery county, and to a point upon a public highway near where the old settlers were meeting. He stopped the wagon upon the highway, but aside from the beaten road, and near the fence. Having unhitched his horses, he placed a keg of beer upon the rear end of the wagon in such position that, standing upon the ground, he could draw beer from it by means of a faucet. In close proximity to the rear end of the wagon he placed a board in such a position as to serve as a sort of shelf upon which to place boxes of cigars. Some of the witnesses state that he also used it as a shelf or sort of temporary counter upon which to place tin quart measures used by him in the sale of the beer. He drew from the keg a quart of beer at a time, and sold it to those who wished to purchase. The beer thus purchased was drank from the quart measures. Some of the witnesses testified that it was drank near the wagon, and others that it was drank from ten to fifteen feet from the wagon. That, however, does not seem to us to be material.

The question for decision is, was the beer sold to be drank, or suffered to be drank, in or about appellant's house, as charged in the indictment, or within the terms of the statute? Was the wagon appellant's house, within the terms of the statute? If it was, appellant was guilty. If it was not, he was not guilty and the judgment must be reversed. In the ordinary and most common use of the word, house means an ordinary building for the use of a family—a dwelling-house—but that is not the only definition of the word, either in common parlance, or in the law. Both recognize such houses as packing-houses, smoke-houses, ice-houses, banking-houses,

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mill-houses, etc., and, in general, business-houses. In such cases, the word house is the equivalent of building. *Ford v. State*, 112 Ind. 373 (378).

The statute under consideration, while it includes all sorts of houses, doubtless has more direct reference to business-houses. But a house must be some sort of a building or inclosed structure. It has been held that a statute punishing the keeping of houses of ill-fame may be violated by maintaining a flat-boat kept on a river, but it was so held because upon the boat was a cabin—an inclosed structure, furnished and protected from the water, and in which men and women ate, slept and lived. The cabin was a dwelling-house because it was an inclosed structure in which persons lived. *State v. Mullen*, 35 Iowa, 199.

It would be difficult to see how an open, uncovered wagon could, by any sort of use, be regarded as a house of ill-fame, or a disorderly house, or how a person having no other habitation or dwelling could be regarded as a householder.

Appellant's wagon, with the beer upon it, might be called his business wagon, and, possibly, for the time being, his business place, but we know of no rule of language or of construction which would sanction a holding that it was, in any sense, his house. He might just as well have placed his keg upon a stump, or upon a rock, and have drawn beer from it to sell to those who wished to purchase. Had he done so, clearly it could not be said that the stump or the rock thereby became his house. And had he left the keg in any way fastened upon the stump, the rock or the wagon, and some one had come in the night, loosened the fastening and taken it away, clearly such an one would not have been guilty of burglary, because neither a stump, a rock, nor an uncovered wagon is a house.

The beer was drank near the wagon, but as the wagon was not a house, it was not, and could not be, sold to be drank or suffered to be drank in or about appellant's house; it was not drank in an out-house, yard or garden. There were none

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such there, but a public highway. There were no "appurtenances thereto belonging," because there was no house to which anything could be appurtenant.

The mention of out-houses, garden, yard, and appurtenances in the above section 5320, indicates very clearly that the Legislature had in mind only a building, a house, used either as a dwelling or as a business house, and was not providing against the sale of liquor in quantities of a quart or more, by a footman upon a public highway, or by a person carrying his liquor in an open wagon upon a public highway. It must be remembered that the Legislature, by the section under discussion, was not providing, nor attempting to provide, an absolute prohibition against all sales of liquor without a license, but only against sales in a less quantity than a quart, and against sales of liquor "to be drank, or suffered to be drank," in the house, out-house, yard or garden of the seller, and the appurtenances thereto belonging. To sell liquor by the quart, or larger quantity, without a license, to be drank, or suffered to be drank, at places other than those named, was not made a crime.

Appellant might have sold a quart of intoxicating liquor at his place of business in Lafayette to be drank at the grove in Montgomery county where the old settlers were holding their meeting, without violating any of the provisions of section 5320, *supra*.

It may be that that section ought to be so amended as to cover a case like this. We think it ought to be so amended, and we can think of no reason why section 2100 should not be so amended as to prohibit the sale of intoxicating liquors within one mile of an old settlers' meeting, as it prohibits such sale within one mile of an agricultural fair, and within one mile from the place where any religious society or assemblage of people is collected for religious worship. But, as already stated, it is not the province of the courts to supply omitted legislation by judicial construction. They have no such authority.

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In support of their contention that section 5320 should be so construed as to hold that appellant's wagon was his house, counsel for the State cite us to rulings in other States upon various statutes.

A law of Alabama, which prohibited the retailing of spirituous liquors except by licensed persons, permitted merchants and shopkeepers to sell by the quart, if the liquor was not drank in their stores, *or on the premises* where they resided or had their stores.

In the case of *Swan v. State*, 11 Ala. 594, it was held that the term "premises," as used in the statute, meant "something over which an individual has control, either by actual possession *or by claiming and exercising* the right to prevent the occupation by others."

In the case of *Downman v. State*, 14 Ala. 242, the above ruling was departed from, and it was held that the term "premises" meant "some place over which the shopkeeper has the *legal right* to exercise authority and control." Those cases are in entire harmony with our construction of our statute. There is nothing in the cases of *Easterling v. State*, 30 Ala. 46, and *Brown v. State*, 31 Ala. 353, in any way in conflict with what we have here decided.

Subsequent to the decision in *Downman v. State*, *supra*, a code was adopted in Alabama, and a section was inserted which made it unlawful for any person, without a license, to sell spirituous liquors in any quantity, "if the same is drank *on or about* the premises."

It was held in the cases last above cited, that, looking at the former law, and the decisions under it, and assuming that the framers of the code had knowledge of those decisions, it should be held that the phrase "about the premises," was used to embrace places over which the unlicensed seller of such liquor had no legal right to exercise authority or control, but which were yet so near his premises, and so situated in relation thereto, that to permit the liquor sold by him to be drank at them would produce the very evil in *kind*, though

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not in *degree*, which the prohibition against drinking it on his premises was intended to prevent.

In the case of *Pearce v. State*, 40 Ala. 720, the above mentioned section in the code seems to have been given a broader application. The facts in that case were that the defendant took intoxicating liquors in a buggy to an administrator's sale. He sold the liquor in quart bottles from the buggy, and the purchasers took it some distance from the buggy and drank it, without knowledge on the part of the seller that they intended to drink it at that place. It was held that the buggy in which the liquor was carried, and from which it was sold, constituted the seller's premises, within the meaning of the code, and that it was drank "about the premises."

On the authority of that case, as stated, and without any reasoning at all, it was held in the case of *Powell v. State*, 63 Ala. 177, that the defendant was properly convicted of selling liquor "drank on and about his premises," on proof that the liquor was sold from a jug which he had in a field where he was working with others, more than a mile from his house, and on the plantation of another person, over which he had no control.

The conclusions in these last two cases were certainly reached by the most liberal rules of construction. Especially may that be said of the conclusion in the last case. That decision, clearly, stretched the law to its utmost tension, if it did not amount to judicial legislation. However that may be, the cases are not authority for a holding that, under our statute, an open, uncovered wagon is a house. Indeed, our statute is so different from the Alabama statutes that the cases are not authority upon any point involved in the case before us. They might, with some plausibility, be relied upon as authority if our law were now as it was in 1873. The act of 1873 (Acts 1873, p. 151), provided that it should be unlawful for any person, without a license, to sell, etc., intoxicating liquors to be drank in, upon, or about the

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building or *premises* where sold. See *O'Connor v. State*, 45 Ind. 347. The same may be said of the case of *Bandalow v. People*, 90 Ill. 218.

Without further elaboration, our conclusion is, that the evidence does not show appellant to have been guilty of any crime under section 5320 of our statutes, and that, therefore, the judgment must be reversed.

Judgment reversed.

Filed Nov. 27, 1888.

No. 14,360.

THE STATE v. CUNNINGHAM.

PERJURY.—*Judicial Proceeding.*—*Materiality of Matters Testified to.*—An indictment for perjury committed in a judicial proceeding must show the materiality of the matters testified to, either by a general averment or by setting out the facts.

SAME.—*Proceedings Supplementary to Execution.*—*Examination of Debtor.*—The inquiry in proceedings supplementary to execution taken under section 815, R. S. 1881, is confined to property owned by the debtor in the county at the time of his examination, and perjury can not be predicated upon his testimony as to what he had previously owned.

SAME.—*Indictment.*—An indictment for perjury charging that the defendant, contrary to his testimony, owned valuable property at the time of his examination in proceedings supplementary to execution, is bad if it fails to state that the property, or a part of it, was subject to execution in the county in which he resided.

From the St. Joseph Circuit Court.

A. L. Brick, Prosecuting Attorney, and L. Hubbard, for the State.

M. Nye, C. W. Wiley and H. R. Robbins, for appellee.

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NIBLACK, J.—On the 12th day of January, 1885, the Household Sewing Machine Company recovered a judgment in the St. Joseph Circuit Court against Andrew Cunningham, the appellee herein, for the sum of \$198 and costs of suit. Cunningham was at the time, and has since continued to be, a resident of St. Joseph county. An execution was thereafter issued on such judgment and delivered to the sheriff of said county of St. Joseph, who, on the 13th day of July, 1885, returned the same wholly unsatisfied. Afterwards the sewing machine company filed its petition in the office of the clerk of the St. Joseph Circuit Court, alleging, among other things, that Cunningham was the owner, and in the possession of, a large amount of personal property, amounting in value to the sum of \$20,000, which he fraudulently concealed so that execution could not be levied upon any part of it; that he was likewise the owner of ten thousand dollars in money which could not be reached by an ordinary writ of execution; that he, the said Cunningham, had wrongfully and fraudulently refused to apply any of the property or money so owned by him to the satisfaction of the judgment rendered against him as above. The petition therefore prayed that an order might be issued requiring him, the said Cunningham, to appear before the judge of the St. Joseph Circuit Court and answer concerning his property within the county of St. Joseph, and an order was issued accordingly. As required by this order, Cunningham appeared before the said judge of the St. Joseph Circuit Court, at the court-house in St. Joseph county, on the 25th day of January, 1886, and, first being duly sworn to tell the truth, the whole truth and nothing but the truth concerning the matters then pending before such judge, testified that he was the owner of no property; that he had not had any personal property for more than a year; that by personal property he meant everything except real estate; that he had received the sum of \$1,390 in money during the summer of 1885, which he had used to pay debts, but that he did not remem-

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ber what had been done with the money, and did not remember a single debt he had paid with it; that he had some worthless notes, but had no other kind; that no other person had any notes for him, except some he had turned over to secure some parties; that he did not own a dollar, and did not on the 21st day of April, 1885; that all the money which had been secured to him by chattel mortgages was gone.

The grand jury of St. Joseph county thereupon returned an indictment against Cunningham charging that he was then and there, as he well knew, the owner of property of more than the value of \$2,000; that there were then and there solvent and collectible debts due him of the value of over \$2,000; that during the year prior to such examination he had had personal property of the value of over \$5,000; that he had had notes and accounts due him from divers persons, which were solvent and collectible, of the value of over \$5,000; that he had had money and cash to the amount of over \$1,000; that he did then and there remember what he had done with the sum of \$1,300 he had received during the summer of the year 1885; that he did have other notes than worthless ones; that he had good collectible notes on solvent persons to an amount exceeding \$1,000; that he did then and there have notes in the hands of other persons for him to an amount greater than \$1,000, which had not been turned over to them to secure certain parties; that he did, on the 21st day of April, 1885, own property, to wit, notes, accounts, debts and judgments due to him of the value of more than \$1,000; that he did, on said 21st day of April, 1885, have money and cash to an amount exceeding \$600; that he did then and there have money, the proceeds of debts secured by chattel mortgage; that during the year prior to such examination he had had, as he well knew, property in said county of St. Joseph of the value and to the amount of \$7,000; that at the time of such examination he had property of the value and to the amount of \$2,000, as he also

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well knew; that his, the said Cunningham's, statements, thus made under oath, were wilfully and corruptly false, and that by reason thereof he was guilty of perjury.

A motion to quash the indictment thus returned against Cunningham was sustained, and he was discharged, and this appeal is prosecuted upon the assumption that the circuit court erred in so quashing the indictment.

There is no rule in criminal pleading more firmly established than that which, in a prosecution for perjury committed in a judicial proceeding, requires the indictment to allege the materiality of the matters testified to, having reference to the essential character of the proceeding then pending before, or under consideration by, the court. 2 Bishop Crim. Procedure, section 921; Gillett Criminal Law, section 692.

This may be shown either by a general averment of materiality, or by setting out the facts testified to, from which their materiality is, as a matter of law, made apparent, the former being the more usual and practical method.

The assignment in the indictment of perjury upon the facts testified to by the defendant, must fully negative such facts, stating with reasonable certainty and directness the particular respects in which the testimony given was false, and not by way of implication. In doing this some amplification is often necessary. 2 Bishop Crim. Proc., sections 918, 919.

From the allegations of the indictment in this case it must be inferred that the proceedings supplemental to execution, in which Cunningham was charged with having sworn falsely, were taken under section 815, R. S. 1881, which confined the inquiry as to the property held and owned by him in St. Joseph county at the time of his examination. This construction is in accordance with the allegations of the petition, and the very nature of the proceeding as illustrated by section 821, R. S. 1881.

As to what property, money or choses in action he may

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have previously owned was quite immaterial, except in so far as it may have tended to show that such property, money or choses in action still belonged to him, or to afford a means of tracing it into the hands of others in connection with other evidence of a more direct and pertinent character. Standing by itself, as is the case before us, the inquiry was too remote and collateral to be material.

As has been seen, Cunningham's examination was mainly as to property, money and choses in action which had previously belonged to him, and had reference to different periods of time.

The first averment of the indictment assigning perjury, to the effect that he was *then* and *there* the owner of property of more than the value of \$2,000 was, consequently, quite indefinite as to the time which the grand jurors probably had in their minds, and hence too uncertain to constitute a good assignment of perjury. The same objection applies to the second and other assignments contained in the indictment.

For the reasons already given, those assignments which merely negative statements made by Cunningham concerning his property, or destitution of property, previous to the time of his examination, presented immaterial issues, and were, therefore, insufficient.

The last assignment, which charged that Cunningham had, at the time of his examination, property of the value and to the amount of \$2,000, was also insufficient for its failure to state that such property, or some part of it, was subject to execution within the county of St. Joseph. *Fowler v. Griffin*, 83 Ind. 297; *Dillman v. Dillman*, 90 Ind. 585; *Wallace v. Lawyer*, 91 Ind. 128; *Cushman v. Gephart*, 97 Ind. 46.

It follows that the circuit court did not err in quashing the indictment.

The judgment is affirmed.

Filed Nov. 27, 1888.

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131	129
132	272

No. 13,265.

LEAKE v. BALL ET AL.

CONTRACT.—*Insurance Policy.*—*Assignment.*—*Consideration.*—*Promise to Pay to Third Person.*—*Statute of Frauds.*—A promise, made in consideration of the assignment to the promisor of a life insurance policy, to pay to a third person a debt due from the assignor, is valid, and not within the statute of frauds.

SAME.—*Payment.*—*Time of Making.*—In the absence of an agreement that the debt is not to be paid until after the death of the insured, it is payable at once.

SAME.—*Rescission.*—*Tender.*—The assignee of the policy can not avoid his promise to pay the stipulated consideration without returning or tendering the policy.

SAME.—*Contract Must be Repudiated as a Whole.*—A contract can not be affirmed in part and rejected in part; it must be repudiated totally or not at all.

From the Vigo Circuit Court.

C. F. McNutt and *S. B. Davis*, for appellant.

L. D. Leveque and *T. W. Harper*, for appellees.

ELLIOTT, J.—It is alleged in the complaint of the appellees that James Hook became indebted to Vigo Encampment, No. 17, of the Independent Order of Odd Fellows; that to secure this debt he executed a promissory note, and that the appellees became his sureties thereon; that at the time the note was executed by the appellees, Hook assigned to them a policy of insurance held by him in the Odd Fellows' Mutual Aid Association, to indemnify them against loss; that the value of the policy at the time of this assignment was twenty-five hundred dollars; that judgment was subsequently obtained on the note executed by Hook and the appellees; that Hook was indebted to Leake, the appellant, and with the consent of the appellees executed to him the following assignment of the policy of insurance: "For value received I assign this policy to J. P. Leake to secure a note

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of \$1011, dated January 7th, 1884. Leake is to assume and pay the money due the Encampment, on which Ball and Harper are sureties. After paying himself the amount of the note and interest, and money paid on the lodge claim above mentioned, the balance to go to the family of Hook."

It is further alleged that the appellees were compelled to pay the judgment obtained against them; that Leake accepted the assignment and policy, and still retains the policy; and that he has not paid the debt due the Encampment.

The promise of Leake is not within the statute of frauds. He obtained a thing of value, and instead of promising to pay the consideration directly to the party with whom he contracted, promised to pay it to a third person. He promised to pay his own debt by paying the creditor of the party with whom he contracted, for what he promised to pay was part of the consideration he agreed to pay for the policy. It was none the less his own debt that he promised to pay, because the person with whom he dealt, instead of requiring that the money be paid to him, required that it be paid to a third person. We need not, however, discuss the question at length, for the law, as many decisions assert, is decisively against the appellant. *Wolke v. Fleming*, 103 Ind. 105; *Windell v. Hudson*, 102 Ind. 521; *Louisville, etc., R. W. Co. v. Caldwell*, 98 Ind. 245; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Indiana Mfg. Co. v. Porter*, 75 Ind. 428; *Campbell v. Patterson*, 58 Ind. 66; *McDill v. Gunn*, 43 Ind. 315; *Davis v. Calloway*, 30 Ind. 112; *Day v. Patterson*, 18 Ind. 114.

The case before us is stronger than any of the cases cited, for here the appellees were the holders of an interest in the property transferred to the appellant.

There was a consideration for Leake's promise—the assignment of the policy to him. The assignment of a policy of insurance is a valid consideration for a promise. It is not material whether the consideration moved from the appellees or from Hook; it is sufficient if Leake obtained the consid-

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eration for which he contracted. It appears, however, that a consideration moved from the appellees as well as from Hook, for they consented to the assignment, and yielded their prior rights.

The promise of Leake is to pay the debt due the appellees at once. There is nothing in the agreement warranting the conclusion that he was not to pay until after Hook's death.

The answer charges that the promise of the appellant was obtained by the fraud of one of the appellees. Several objections are urged against the answer by the appellees, but we deem it necessary to consider only one of them. The objection that the answer does not tender back the policy nor offer to return it, is fatal. The appellant can not avoid his promise and still retain the policy.

It is said by counsel that the appellant has an equitable interest in the assignment, and from this their conclusion is that he has a right to retain the policy and still avoid his contract. This argument is plainly fallacious. A contract can not be affirmed in part and rejected in part; it must be totally repudiated or not repudiated at all. The appellees had a right to the policy under the prior assignment, and this right must be fully restored to them or the appellant must pay what he agreed to pay in his contract with them and their debtor.

Judgment affirmed.

Filed Sept. 20, 1888; petition for a rehearing overruled Nov. 27, 1888.

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No. 13,344.

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COMPANY v. BIRD.

116	217
134	593
116	217
137	483
139	630
116	217
144	43
116	217
170	580

JUDGMENT.—*By Agreement.*—*Broader Than Pleadings Authorize.*—A judgment by agreement will bind those by whose agreement it is entered, notwithstanding the pleadings would not, in a contested case, authorize such a judgment.

SAME.—*Setting Aside.*—*Negligence of Judgment Defendant.*—*Innocent Assignees.*—A judgment by agreement will not be set aside where the judgment defendant has been guilty of laches and the rights of innocent third persons have intervened, although it is alleged that through the fraudulent representations of the judgment plaintiff the clerk entered the judgment for broader relief than was agreed upon by the parties.

SAME.—*Reading in Open Court.*—*Presumption.*—It will be presumed, in the absence of a showing to the contrary, that a judgment was read in open court as the law requires, before being signed by the judge, and that it is such a judgment as the judge intended should be entered.

SAME.—*Mistake.*—*Negligence of Parties.*—*Innocent Persons.*—As against innocent third persons, a party will be charged with negligence who fails to be in court when a judgment in which he is interested is read, or who, being in court, fails to call the attention of the court to mistakes in the entry of the judgment.

SAME.—*Notice.*—*Order-Book Entry.*—A purchaser of land and a judgment affecting it is not required to look beyond the order-book where the judgment is entered and attested by the signature of the judge, and if nothing is disclosed to put him upon inquiry, he is an innocent purchaser.

From the Randolph Circuit Court.

C. W. Fairbanks, O. Gresham, E. L. Watson and J. S. Engle, for appellant.

W. A. Thompson, O. A. Marsh and J. W. Thompson, for appellee.

ZOLLARS, J.—Our code provides that a party may be relieved from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect; and also, that for any error of law appearing in the proceedings and

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judgment, or for material new matter discovered since its rendition, a party may have a review of a judgment taken against him. R. S. 1881, sections 396, 616.

This proceeding, instituted by appellant, can not be regarded as an application or proceeding under either of the above sections of the code. It does not purport to be, but invokes an exercise of the inherent powers of the court for the correction and amendment of a judgment.

The court below struck out appellant's motion, or complaint as it is styled in the record, and that ruling is assigned as error.

The following summary of that motion or complaint will suffice for the purposes of this decision, viz.: On the 9th day of March, 1883, there was pending in the Randolph Circuit Court an action by Lindley Beard against the railway company, appellant in this action. It was charged in Beard's complaint that he was and had been the owner of certain described lands over which the railway company had constructed its road; that, in that construction, it crossed a natural watercourse, and so obstructed, interfered with and cut off the flow of the water as to injure the land. On the day above stated, the suit was compromised, and it was agreed that judgment should be rendered against the railway company and in favor of Beard for twenty-five dollars. It was further agreed that so soon thereafter as practicable the railway company would construct a sufficient way under the grade of its road to allow the passage of the water of the watercourse, but there was no agreement as to the size or dimensions of the way thus to be opened, nor was it a part of the agreement that the same should be entered of record as a part of the judgment or otherwise. Upon the compromise being made, the court entered upon the court docket, "Withdrawn from the jury by agreement; judgment by agreement for twenty-five dollars," which was the only judgment agreed upon, and to be entered in the cause. Beard's attorneys, acting for him, and with the fraudulent intent on

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his and their part to cheat and defraud the railway company, represented to the clerk of the court that an agreement had been made as to the construction of the water-way under the road-bed, and that such agreement was to be entered as a part of the judgment. By means of such fraudulent representations, the clerk was induced to enter and write up as a part of the judgment, in addition to the money judgment, the following: "And the defendant shall make, at the point where the defendant's road crosses the watercourse described in the complaint on the plaintiff's land, a culvert five feet wide and eight feet deep, and excavate the dirt from the bottom of the watercourse to the top of the grade, within thirty days from this date."

Acting upon the representations of Beard's attorneys, the clerk made the entry by mistake as to the real facts. The railway company had no knowledge that the judgment was thus entered until in 1885, when called upon by the appellee herein, Gideon Bird, to construct the culvert. Prior to that time, and in 1884, Lindley Beard, the owner of the land, and judgment plaintiff, had sold and assigned the judgment to Bird, and also sold and by deed conveyed the land to him.

It is also charged in the motion or complaint, that in Beard's complaint against the railway company there was no averment, prayer or demand entitling him to any relief except a money judgment, and that there was no pleading of any kind asking for the opening of a water-way through or under the road-bed of the railway company. There is the further averment that the judgment, as entered by the clerk, was contrary to the memorandum made by the court upon its docket.

The relief asked was that the judgment rendered in Beard's favor against the railway company might be amended, by striking out and expunging all that portion relating to the culvert or water-way; in other words, by striking out and expunging all except the money judgment.

The averments as to the judgment being contrary to the

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memorandum made by the judge, and as to there having been no pleadings entitling Beard to the judgment entered by the clerk, are conclusions, and not the statements of facts, and hence should be disregarded.

As to whether or not the judgment entered by the clerk was contrary to the memorandum made by the judge, is a question of law, to be determined by an inspection of that memorandum and the judgment entered. And as to whether or not the pleadings entitled Beard to the judgment entered by the clerk is also a question of law, to be determined by an examination of that judgment and the pleadings in the cause. The pleadings are not set out, nor is there any averment as to what they contained by way of statements of facts, or in the way of prayer for relief. In the absence of the pleadings, or averments as to their contents, it ought to be assumed that they were broad enough to authorize the relief given by the judgment, notwithstanding the allegation here of the conclusion that they were not.

It may be observed, also, that there are no averments here as to what, if any, entries there may have been made by the clerk in the issue docket, and from which he may have, in part at least, constructed the entry of the judgment. See *Chissom v. Barbour*, 100 Ind. 1.

If, however, it should be conceded that the judgment as entered was broader than the pleadings, that, of itself, would not be sufficient reason for expunging a portion of the judgment. A judgment by agreement will bind those by whose agreement it is entered, notwithstanding the pleadings would not, in a contested case, authorize such a judgment. *Fletcher v. Holmes*, 25 Ind. 458 (463); *Hudson v. Allison*, 54 Ind. 215; *Lyon v. Roy*, 54 Ind. 300.

The fact, if conceded, that the pleadings may not have been broad enough in a contested case to authorize the judgment entered, might be a circumstance of some weight in support of the averment that the judgment as entered was not in accordance with the agreement of the parties, but, as

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already stated, it would not be sufficient of itself to authorize the expunging of a part of the judgment.

We, however, place our decision upon other grounds. As above stated, the judgment in favor of Beard was rendered on the 9th day of March, 1883.

Subsequent thereto, but before this proceeding was instituted, Beard sold and conveyed the land to Bird, and sold and assigned all of his rights and interests in and to the judgment to him.

This proceeding was commenced on the 6th day of March, 1885. There was no service upon Beard, and the proceeding was prosecuted to its final decision below against Bird alone. He was an innocent purchaser, for value, both of the land and the judgment. The exact date of the conveyance and assignment to him is not stated, but as it was in 1884 it must have been at least ten months subsequent to the rendition of the judgment, and may have been one year and ten months subsequent to that time. In either event, we think that the laches on the part of the railway company, and the intervening rights of appellee, Bird, were such as to render it improper for the court to interfere by way of amending the judgment in favor of the former and against the latter. The court was asked to make the amendment, not by virtue of any statute of this State, but by virtue of its inherent authority to make the judgment as entered conform to the judgment as appellant asserts it was rendered. That the courts of this State have such authority in a proper case is well settled, but in exercising that authority they will look to the equities of the parties, and will not so exercise it as to reward the negligent, and at the same time destroy the equities of the innocent. *Ryon v. Thomas*, 104 Ind. 59, and cases there cited. See, also, *Chissom v. Barbour*, *supra*.

In the case before us, the railway company was in court, not only when the compromise was agreed upon and reported to the court, but as one of the parties to the compromise. Theoretically, if not in fact, it was in court when the

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entry of the judgment was read and signed by the judge. There is no averment in the motion or complaint here that it was not so in court. As against innocent third persons, it was its duty to be thus in court, and to see to it that the entry embodied, correctly, the judgment agreed upon. The purpose of the statute requiring judgments to be read in open court before being signed by the judge, doubtless, is to give litigants an opportunity of calling attention to any mistakes which may have been made by the clerk. See *Freeman Judgments*, section 142. As against innocent third persons, a party ought to be charged with negligence who neglects to be in court when the entry of a judgment in which he is interested is read, or who, being in court, neglects to call the attention of the court to clerical mistakes by the clerk in the entry of the judgment.

Appellant not only failed to apply for a correction of the judgment entry when it was read in open court, and at the term at which the judgment was rendered, but also exercised no care to ascertain what the entry was, until after appellee had parted with his money in the purchase of the land and the judgment, and not even then, for it is averred in the motion or complaint that it had no notice of what that entry was until 1885, a short time before this proceeding was commenced, when called upon by appellee to construct the water-way.

Even where there are no innocent third persons involved, a court of equity will not interfere to relieve a party from a judgment where he has been guilty of gross laches. *Barber v. Rukeyser*, 39 Wis. 590; see, also, as analogous, *Brumbaugh v. Stockman*, 83 Ind. 583; *Burton v. Harris*, 76 Ind. 429. And especially will a party not be relieved from a judgment where he has been guilty of laches and rights of innocent third persons have intervened. See *Earle v. Earle*, 91 Ind. 27.

The law requires, as we have seen, that all entries of judgments shall be read in open court before being signed by the

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judge. In the absence of something positive to the contrary, it will be presumed that the law was followed in that regard in the case of Beard against the railway company. And, in the absence of something positive to the contrary, it should be presumed in favor of the action of the court below that the judge who presided gave attention to the reading of the entry and affixed his signature to the judgment which he intended should be entered, and which he had in fact rendered upon the compromise and agreement of the parties. See *Forquer v. Forquer*, 19 Ill. 67.

We have said this much in passing without undertaking to determine as to whether or not there was, or is, anything in the record of the case of Beard against the railway company by which the amendment of the judgment asked could properly be made, or as to whether or not the judgment as entered by the clerk is in any way in conflict with the memorandum made by the judge upon the court docket. Under the circumstances, Bird, the purchaser of the land and the judgment from Beard, was not required to look beyond the order-book where the judgment was entered and attested by the signature of the judge. So far as shown here, that entry contained nothing indicating that it was not the judgment of the court, or that it had been made in violation of any contract or compromise between the parties. As between Bird and the railway company, he had the right to rely upon the order-book entry. As between them, he must be regarded as an innocent and good-faith purchaser of the land and the judgment.

As entered, the judgment affected the land in an important particular. The embankment for the bed of the railway obstructed a natural watercourse upon the land. The judgment provided for the removal of that obstruction. Whatever may be the force and effect of that portion of the judgment, or whatever may be the proper mode of its enforcement, we know of no reason why Bird might not, in the purchase of the judgment and the land, act upon the assumption that

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the railway company would remove the obstruction by making the water-way as in the judgment provided. And, in addition, there was a judgment for twenty-five dollars, regular upon its face, entered in the proper order-book and attested by the signature of the judge. Upon the faith of that record Bird invested his money in the judgment and in the land. He was guilty of no negligence as against the railway company in relying upon the record. The court had complete jurisdiction. There was no fraud upon the court, nor was the railway company in any way prevented from making its defence to the action.

The record showed nothing indicating that any fraud had been practiced upon that company by Beard or his attorneys. It showed nothing to put Bird upon inquiry. The judgment had been entered, read in open court and signed by the judge without objection from the railway company. It had been allowed to stand as a public record without objection on the part of that company, and without any effort on its part in the way of a correction. In short, as between Bird and the railway company, the latter had been guilty of negligence, and the former had not.

The party thus guilty of negligence is not in a position to ask for an amendment of the judgment which shall operate to the injury of the party who was without fault.

In the case of *Ryon v. Thomas*, *supra*, it was said: "All mistakes in a final judgment of a merely clerical character may be amended in a direct proceeding for that purpose, where the rights of some third party have not intervened in such a manner as to render an amendment inequitable."

The case of *McCormick v. Wheeler*, 36 Ill. 114 (85 Am. Dec. 388), involved the right to a *nunc pro tunc* entry as against an innocent third person. The court said: "There is no doctrine resting on a more stable ground, both of reason and authority, than that all material amendments of a record must be made with a saving of intervening rights acquired by third persons. In an order allowing an amend-

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ment, it is proper to express this by way of removing all doubt. But whether expressed or not, the law makes the reservation. For what is the judgment of a court? It does not reside, unspoken and unwritten, in the breast of the judge. It is not to be sought in the minutes or memoranda which the judge makes upon his own docket, and which the law does not require him to make, but which are merely kept by him for his own convenience, and to enable him to see that the clerk accurately makes up the record. These minutes, it is true, are a proper means of amending a record, but until the amendment is made, the public can act upon no other means of information than the official records of the court, as kept by an officer appointed by the law for that purpose. How often have this and other courts expressed the maxim that 'a record imports absolute verity?'"

In the case of *Church v. English*, 81 Ill. 442, one of the parties was asking for an amendment of the judgment so as to make it conform to the judge's minutes entered upon his docket. In the decision of the case the court said: "As between the original parties, we are not aware of any limitation as to the time in which such amendments may be allowed. No reason suggests itself why such amendments may not be made at any time, so long as anything definite and certain remains to amend by. But until the amendments are actually made, third persons can act upon nothing but the official record, kept by the officers appointed for that purpose, and all rights previously acquired are in no manner affected by subsequent amendments." *Cook v. Wood*, 24 Ill. 295; *McCormick v. Wheeler*, 36 Ill. 114.

This court has often stated the general rule to be, that judgment creditors are not purchasers; that their judgments are simply general liens upon whatever interest the judgment defendant may have in the land; that their rights do not stand in the way of the reformation of prior deeds and mortgages, nor in the way of the enforcement of equities as

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between the grantor and grantee. *Hays v. Reger*, 102 Ind. 524; *Boyd v. Anderson*, 102 Ind. 217; *Foltz v. Wert*, 103 Ind. 404; *Heberd v. Wines*, 105 Ind. 237; *Wells v. Benton*, 108 Ind. 585. In those cases many of the former decisions are cited.

It has not been decided by this court, however, that a judgment like that under consideration will be amended by expunging a portion of it as against a good-faith purchaser and assignee, where the judgment defendant has been guilty of negligence and laches. On the other hand, there are a number of cases in our reports in which it was held that a good-faith purchaser and assignee of a judgment will be protected, under some circumstances, where his assignor, the judgment plaintiff, will not be. The doctrine of those cases, generally stated, received support by the opinion upon the petition for a rehearing in the case of *Wells v. Benton*, *supra*.

In the case of *Boyd v. Anderson*, *supra*, it was said, that in some of our cases, it was held that a deed or mortgage will not be reformed as against a *bona fide* assignee of a judgment.

In the case of *Flanders v. O'Brien*, 46 Ind. 284, it was held that a mortgage upon real estate could not be corrected in the description of the land as against an innocent *bona fide* purchaser and assignee of a judgment against the mortgagor. After stating that a mistake in the description of the land intended to be mortgaged may be corrected as against a subsequent judgment plaintiff, it was further said: "The equity in favor of the mortgagee in such cases may be stronger than that in favor of the judgment plaintiff. The judgment plaintiff has not, probably, parted with his money on the faith of the apparent facts. But where the judgment has been sold and assigned to one ignorant of the mistake in the mortgage, and who has expended his money upon the faith of the rights of the parties, as they appear in the respective securities, it is difficult to see any superior equity in the mortgagee. Such purchaser of the judgment has acted

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upon the apparent facts of the case, as the parties have allowed them to exist. It is their fault if the papers do not speak the truth, and it may be unjust that their mistakes should be cured to his injury, who has been misled by their failure to attend carefully to their own business."

That ruling was approved in the case of *Busenbarke v. Ramey*, 53 Ind. 499, and reasserted in the case of *Wainwright v. Flanders*, 64 Ind. 306. See, also, *Ritter v. Cost*, 99 Ind. 80 (88); *Tuttle v. Churchman*, 74 Ind. 311; *Rooker v. Rooker*, 75 Ind. 571; *Milner v. Hyland*, 77 Ind. 458.

The cases last above noticed and cited are not in all respects like that before us, but they are somewhat analogous. The reasoning in those cases for the protection of the innocent against the negligent may be applied here for the protection of Bird, the purchaser of the land, and the purchaser and the assignee of the judgment.

The case of *Gray v. Robinson*, 90 Ind. 527, is more analogous. In that case there was a mistake in the amount of a judgment taken by agreement against the principal and sureties upon a promissory note. The amount was computed by the plaintiff. Execution was levied upon enough of the principal's property to satisfy the judgment. The sureties, to save it from sacrifice, paid the judgment, without any knowledge of the mistake, made settlement with the principal on the basis of the judgment, taking the obligation of a third person to indemnify themselves for the sum so paid; the property was disposed of, and the principal was insolvent. Afterwards the judgment plaintiff moved for a correction of the judgment. It was held that the judgment could not be corrected as against the sureties, upon the ground that a party will not be relieved from his own mistake or carelessness, where rights have been lost or money parted with on the faith of the apparent facts.

In support of the ruling, the court cited *Flanders v. O'Brien*, *supra*, and quoted Freeman on Judgments, section 66, as follows: "The entry of judgments or decrees *nunc*

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pro tunc, is intended to be in furtherance of justice. * * * Generally such conditions will be imposed as may seem necessary to save the interests of third parties, who have acted *bona fide*, and without notice; but if such conditions are not expressed in the order of the court, they are, nevertheless, to be considered as made a part of it by force of the law."

And, further, section 74 of the same work, as follows: "Amendments of the entries of judgments and of decrees, * * will only be permitted in furtherance of justice, and on such terms as shall protect the interests of third parties acquired for a valuable consideration without notice."

To the same effect is the case of *Urbanski v. Manns*, 87 Ind. 585. In that case this court quoted with approval the following portion of section 66 of Freeman on Judgments: "The public are not expected nor required to search in unusual places for evidences of judgments. They are bound to take notice of the regular records, but not of the existence and signification of memoranda made by the judge, and upon which the record may happen to be afterwards perfected." See, also, *Wright v. Manns*, 111 Ind. 422.

Without further extending this opinion, we hold that by reason of negligence and laches on the part of the railway company, and the intervening rights and equities of Bird as an innocent purchaser of the judgment and land, the judgment should not be amended, as asked by the railway company, and that, therefore, the court below did not err in striking out appellant's motion or complaint.

Judgment affirmed, with costs.

Filed Dec. 11, 1888.

The Western Plank Road Co. v. The Central Union Telephone Co.

No. 13,322.

THE WESTERN PLANK ROAD COMPANY v. THE CENTRAL
UNION TELEPHONE COMPANY.

CORPORATION.—*Forfeiture of Franchise.*—*Judicial Declaration.*—The fact that a corporation has been guilty of a breach of duty constituting a cause for forfeiture of its franchise, can not be taken advantage of in a private action, nor by entering upon the corporate property, as forfeiture can only be judicially declared and in the manner prescribed by law.

HIGHWAY.—*Corporate Franchise.*—*Abandonment.*—*National Road.*—*Easement.*—A private corporation could acquire no more than an easement in the highway called the National Road, burdened with a duty to maintain a highway for the use of the public, and by its failure to perform the duties required by law it loses its rights in the highway, and will be deemed to have abandoned it to the public, without any judicial declaration to that effect, and the officers of the public may take possession and control of the road.

From the Vigo Superior Court.

C. F. McNutt and S. B. Davis, for appellant.

ELLIOTT, J.—The appellant acquired title to part of the National or Cumberland Road surveyed under the acts of Congress. After the acquisition of title it expended in the construction and repair of a toll road the sum of \$24,534.04, and it kept the road in repair for many years, and collected tolls until the year 1871. On the 30th of July, 1867, the board of commissioners of Vigo county entered the following order: "Whereas the Western Plank Road Company on the National Road having failed to keep said road in good and proper repair as required by law; it is hereby ordered that the trustees of the various townships through which said road runs in Vigo county be and are hereby required to have the said road worked and kept in repair by the several supervisors thereof through whose districts said road runs." There was no judicial finding at that time, or any other time, that appellant had abandoned the road or suffered it to re-

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main out of repair, but work was done on the road by supervisors in the year 1867. No report was made by the board of directors as required by the acts of March 9th, 1875, and March 13th, 1877. In March, 1875, another order was made by the board of commissioners of Vigo county, declaring that the road had been abandoned by the appellant, and declaring that it should be deemed a public highway of the county. This order was made without notice and without the knowledge or consent of appellant. During the period from 1873 to 1877 repairs were made by the appellant to the value of twenty-five dollars per annum. Directors were elected in 1875 who served until 1881, when directors were elected who served until 1885, at which time the directors in office when this action was commenced were elected. The road has been used unobstructedly by the public since the appellant ceased to collect toll in 1871. The officers in charge of the public highways have expended money for repairs without appellant's knowledge or consent. The appellee has entered upon the road and erected a telephone line without the consent of the appellant.

We have given a synopsis of the evidence as it appears in the record, but we have not deemed it necessary to particularly set forth the manner in which the appellant acquired title, for we think it enough to say that the appellant did at one time have a valid title, as the owner of an easement, to that part of what was formerly the National or Cumberland Road involved in this controversy. The question, therefore, is whether the title which the appellant once possessed has been lost or divested.

We have not been favored with a brief from the appellee's counsel, and we do not definitely know upon what ground the trial court proceeded. The best we can do is to examine for ourselves the law upon the subject, and ascertain upon what theory, if any, the judgment can be sustained.

The orders entered by the board of commissioners can not be allotted the full force of judicial judgments, for the plain

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reason that the appellant had no day in court. The franchises and property of a corporation can not be taken from it by a judgment in a proceeding of which it had no notice.

The failure of the officers of the corporation to make the reports required by law did not of itself so far destroy the corporate existence as to authorize a seizure of its property by another corporation. The act of 1877 provides for punishing the officers who fail to make the reports required, but it does not declare that a failure on their part shall operate to dissolve the corporation. Acts of 1877, Spec. Sess., p. 52. If, however, the act did make the breach of duty a cause of forfeiture, still, no person could take advantage of the cause in a private action, or by entering upon corporate property. Forfeiture can only be judicially declared and in the manner prescribed by law. *North v. State, ex rel.*, 107 Ind. 356, and cases cited; *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460.

It results from the principles we have stated that if the appellant has lost the title it once possessed, it must be because it abandoned the highway it had purchased. Our inquiry, therefore, is narrowed to the question whether the evidence shows an abandonment.

It is important to note at the outset that the question is not whether the public shall lose a highway, but whether it shall pass from the control of a private corporation, exacting tolls, into the hands of public officers, still remaining in every respect a highway open and free to the public. We are not, therefore, concerned with the question whether the public can lose a highway by a mere non-user or by a breach of duty by public authorities, for the only question which confronts us is, whether a corporation may lose what was laid out as a public highway by a failure to perform the duty enjoined upon it by law.

The title acquired by the appellant was not to the property as land, but to it as a highway. In other words, the rights acquired by the appellant were an easement and a

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franchise. These rights were charged and burdened with a public duty: the duty to maintain a highway for the use of the public. The appellant did not acquire an absolute title, for the State, as the grantee of the National Government, did not sell or propose to sell an absolute right. The assumption in appellant's argument that the title acquired was in fee is consequently a groundless one. The truth is, that neither the Federal Government nor the State ever clothed any one with a right to destroy a highway surveyed and in part constructed as a great thoroughfare. The legislation, Federal and State, very clearly shows this.

We think that the evidence sustains the conclusion of the trial court that the highway was abandoned by the appellant and passed under the control of the public authorities. Under our statutes a private corporation which fails to perform its duty is deemed to abandon the highway to the public. If it does neglect its duty, and the officers of the public exercise control over the highway, it loses its rights without a judicial declaration to that effect. It can not by a mere assertion of right defeat the operation of the law, but the fact of an abandonment being established its rights are lost. In order to prevent the loss of its rights it must maintain possession and obey the law. In the case of the *State v. Huggins*, 47 Ind. 586, it was decided that "The Legislature has power to determine what circumstances shall vacate a public highway, and upon the occurrence of such circumstances it shall be deemed vacated without judicial determination." This is the essential principle involved in the case at bar.

The question is not whether corporate rights have been forfeited, but whether a highway has been abandoned, and the fact that it has been abandoned establishes, without judicial intervention, the rights of the public. When it is made to appear that a corporation has abandoned, by a neglect of duty, or otherwise, a highway granted it, the officers of the public have a right to take possession without any judgment of court. It is the fact that there was an abandon-

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ment that destroys the rights of the private corporation and revives those of the public.

As we have concluded that there was an abandonment to the public we need not and do not enter into a consideration of the vexed question as to the right of a telegraph or telephone company to erect poles along the line of a public highway.

Judgment affirmed.

Filed Sept. 26, 1888; petition for a rehearing overruled Dec. 11, 1888.

No. 13,398.

HAYES ET AL. v. MINNICH.

SPECIAL FINDING.—*Conclusions of Law.*—*Supreme Court.*—*Practice.*—Where a question is reserved upon a conclusion of law, but not upon the special finding upon which it is based, the latter will not be reviewed in the Supreme Court.

From the Kosciusko Circuit Court.

A. C. Clemans and A. G. Wood, for appellants.

L. H. Haymond and L. W. Royse, for appellee.

NIBLACK, J.—This was a suit by Franklin V. B. Minnich against William Hayes and Emelia Hayes, his wife, to foreclose a mortgage.

For some years previous to the 24th day of March, 1880, Emelia Hayes was the owner of a part of a lot of ground in the town of Pierceton, in Kosciusko county. Prior to the date named, William Hayes, her husband, proceeded to erect a brick house on this part of a lot, and employed the appel-

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lee, Minnich, to put an iron roof on the building, upon the faith of certain representations as to the sufficiency of such roof to protect the building. Minnich put an iron roof on the building accordingly. On the 24th day of March, 1880, referred to, Hayes and wife had a settlement with Minnich concerning this iron roofing, including, perhaps, some other matters, and, as a result of such settlement, executed to him two promissory notes, one for \$350 payable in one year, and the other for \$362.74 payable in two years from date. They also, at the same time, executed to Minnich a mortgage on the house and lot in question to secure the payment of these notes, and it was to foreclose the mortgage thus executed that this suit was prosecuted.

During the progress of the cause Mrs. Hayes died, and her children and heirs at law were made parties defendants in her stead.

The circuit court made a special finding which was in accordance with the facts as herein stated, and also finding that the roofing put on the building by Minnich was not of the quality agreed to be put on by him, but was defective and not sufficient to protect the house; that by reason of its defective condition water ran down through it on to the walls and into other parts of the building, thereby causing serious damage to it; that by reason thereof the defendants were entitled to a recoupment; that there was due upon the face of the notes the sum of \$739.12; that the defendants were entitled to recoup the sum of \$245, the amount at which their damages were assessed.

From the facts thus found, the circuit court came to the conclusion that Minnich ought to have judgment for the sum of \$494.15, and accordingly rendered a personal judgment against William Hayes for that sum, decreeing in addition a foreclosure of the mortgage and a sale of the mortgaged premises.

The evidence is not in the record, and the only question presented here is upon the conclusion of law arrived at as

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above. The only objection in that respect is, that upon the facts as found the defendants were entitled to a recoupment for a sum greater than \$245. But the particular facts relied upon to sustain this objection are not specifically designated. Besides, if the damages resulting to the defendants were correctly assessed, there was no error in the conclusion stated by the court. The objection urged is, therefore, an attack upon the special finding rather than upon the conclusion drawn from it, and as no question was reserved upon the special finding, there is nothing presented for our decision which involves the real merits of the controversy at the hearing below.

The judgment is affirmed, with costs.

Filed Dec. 11, 1888.

No. 13,319.

LINDLEY ET AL. v. THE STATE, EX REL. WELLS, ADMINISTRATOR.

DECEDENTS' ESTATES.—*Sale of Personality.—Insufficient Security.*—*Administrator Liable on Bond.*—An administrator who negligently accepts promissory notes executed by insolvent persons, at a sale of his intestate's personal property, is liable under section 2303, R. S. 1881, on his bond for both principal and interest, but he is entitled to have the notes turned over to him.

From the Orange Circuit Court.

J. W. Buskirk, H. C. Duncan, W. Farrell and W. Throop,
for appellants.

W. H. Martin, for appellee.

 Carver v. Fennimore.

ELLIOTT, J.—This is an action on the bond of an administrator.

The special finding states that the administrator sold the personal property of the intestate and took in payment promissory notes executed by insolvent principals and sureties. Under the provisions of section 2303, R. S. 1881, the appellants are liable. That section requires the administrator to show that he used "due care and caution in taking such note or obligation," and thus casts upon him the burden of showing that he was careful and diligent.

The court did right in charging the administrator with interest, for he lost to the estate the principal and interest by accepting the obligations of insolvent persons.

There was certainly no error of which appellants can complain in the order of the court directing that the claims against insolvent debtors be turned over to him.

Judgment affirmed.

Filed Sept. 29, 1888; petition for a rehearing overruled Dec. 11, 1888.

116	236
127	94
127	568
116	236
164	93

 No. 13,450.

CARVER v. FENNIMORE.

TENANCY IN COMMON.—*Occupying Claimant.*—*Rents and Profits.*—*Accounting.*—Where one occupies the whole estate in land and contests the claim of another to an interest therein, the latter is entitled, upon establishing his rights as a tenant in common, to an accounting for his just proportion of the use and occupation of the land.

SAME.—*Equity.*—An action by an excluded tenant against a co-tenant for an accounting for rents is a liberal and an equitable one, and equit-

116	236
170	314

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able defences may be made; and if the plaintiff receives actual compensation for the damages sustained he has no ground of complaint.

SAME.—*Improvements Made Under Claim of Title.*—As a rule, the owner of an undivided interest in land, who occupies the whole estate in good faith, under claim and color of title to the whole, and who has made permanent and valuable improvements thereon, believing himself to be the owner of the whole estate, is accountable only for the fair rental value of the property as it was when it went into his possession.

SAME.—*Improvements Made Pending Action.*—Pending an action to establish title to an undivided interest in unimproved land, A. purchased the same and made valuable improvements thereon, his grantor in good faith claiming title to the whole estate. While the action was still undisposed of B. purchased the land. Subsequently the plaintiff was adjudged to be the owner of an undivided one third of the land. Suit against B. for an accounting.

Held, that, in the absence of equitable circumstances, the plaintiff is entitled to recover only on the basis of the rental value of the land before it was improved.

From the Madison Circuit Court.

H. D. Thompson, for appellant.

W. A. Kittinger, *L. M. Schwin* and *E. B. McMahan*, for appellee.

MITCHELL, J.—Complaint by Esther J. Carver against Joseph Fennimore, in which the plaintiff alleged that the defendant was indebted to her in a specified sum for the one-third of the profit, use and occupation of a certain lot or tract of land in the town of Alexandria, in Madison county.

Issues were made which were tried by a jury, who returned a verdict for the defendant.

The questions for decision will be understood by the following statement of facts: In 1857 Ira K. Carver, the plaintiff's husband, was the owner of 80 acres of land adjoining the town of Alexandria, which he conveyed by a deed of general warranty to his brother, William Carver. The plaintiff's name was signed to the deed without her knowledge or consent, and she remained in ignorance of the conveyance until after the death of her husband, which occurred in April, 1875. She then learned of the conveyance, and that her

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signature appeared on the deed, whereupon, on the 26th day of February, 1876, she instituted a suit in the Madison Circuit Court against William Carver and about twenty others, who claimed different parcels of the land as grantees under him, to set aside the deed, for possession, and to have the title to the land quieted in her. This suit was pending in the circuit court until April, 1879, when the plaintiff recovered a judgment and decree against all the defendants in that suit, establishing and quieting her title to, and right to the immediate possession of, the undivided one-third of all the lands so conveyed, and for \$125 damages against William Carver. An appeal was taken to this court, where the judgment was afterwards affirmed on the 16th day of October, 1884. *Carver v. Carver*, 97 Ind. 497.

William Perry owned the lot, for the use and occupation of which the plaintiff seeks to recover in the present action, at the time the suit above mentioned was commenced, and he was duly summoned as a party thereto. Pending the suit Perry conveyed by warranty deed to Mrs. Fadley, who made valuable improvements on the lot, and who, subsequently, in April, 1880, while the appeal was pending in this court, conveyed to the appellee, Fennimore. At the time the suit for possession was commenced the lot was unimproved, and the value of the use was merely nominal.

The question now is whether or not Fennimore is liable for the use and occupation of the land, and if he is, whether or not the rental value is to be estimated according to the condition of the land prior, and without reference, to the improvements placed thereon by his grantor pending the suit, or whether he must account for the value of the use of the land, with the improvements?

On behalf of the appellant it is contended that the only defence the appellee was legally entitled to make was as to the rental value of the property as it was when he had possession of it; that the judgment and decree in the former suit

determined all questions as to the value of the improvements upon the real estate.

It may be conceded that the former judgment and decree settled conclusively all questions concerning the ownership of the land, and of the title to the improvements which had become a part of the freehold, whether such improvements existed thereon when the action was commenced, or were made pending the litigation. This concession, however, does not dispose of nor materially affect the questions for decision in the present case. The effect of the decree in the former suit was to declare, and conclusively establish the fact, that the appellant was the owner of an undivided one-third of the property in dispute, and that she was entitled to occupy the legal relation of tenant in common with those who claimed title to the lot under the deed of her deceased husband. That question is no longer open to debate, but the rights and obligations of the co-tenants, as such, in respect to the improvement or enjoyment of the common estate, had not been adjudicated.

The relation of tenant in common arises "where two or more persons are entitled to land in such a manner that they have an undivided possession, but several freeholds, *i. e.*, no one of them is entitled to the exclusive possession of any particular part of the land, each being entitled to occupy the whole in common with the others, or to receive his share of the rents and profits." *Rapalje & Lawrence Law Dict.*, tit. "Tenancy in Common."

That one tenant may exclude the other from or deny his title to the common estate, does not destroy the legal relation or the respective rights and remedies of co-tenants, if they be in fact owners in common, nor does a decree establishing and quieting the title of the excluded tenant necessarily determine the rights of the parties as regards an equitable accounting in an appropriate proceeding in respect to use and occupation, nor in respect to improvements made

in good faith by the occupying tenant. *Carver v. Coffman*, 109 Ind. 547.

The decree conclusively establishes the fact of common ownership in the property, but it does not necessarily settle the equities between the parties growing out of the occupancy or improvement of the common estate.

Notwithstanding the statute, section 288, R. S. 1881, which declares in effect that a tenant in common may maintain an action against his co-tenant for receiving more than his share or just proportion, the settled rule is, that a co-tenant can only be compelled to account in case he has actually received rents from a third person, or when he has entered upon and held exclusive possession of the whole estate in hostility to and to the exclusion of his co-tenant. *Humphries v. Davis*, 100 Ind. 369, and cases cited; *Carver v. Coffman*, *supra*, and cases cited; *Osborn v. Osborn*, 62 Texas, 495; *Edsall v. Merrill*, 37 N. J. Eq. 114; *Early v. Friend*, 16 Gratt. 21 (78 Am. Dec. 649, and note); *Kean v. Connelly*, 25 Minn. 222 (33 Am. Rep. 458).

It appears that the appellee and his grantors occupied the whole estate, denied the right of the appellant, and contested her claim to an interest in the common property. She is, therefore, entitled, within the rule above declared, to an accounting for her just proportion of the use and occupation of the lot in controversy. *Freeman Cotenancy and Par.*, sections 275, 277.

The instructions of the court relevant to the features of the case above considered, were substantially in consonance with the foregoing conclusions.

In refusing an instruction asked by the appellant, and in the admission of evidence, the court proceeded upon the theory that the liability of the defendant was to be determined upon the basis of the rental value of the property in the condition it was prior to the making of the improvements thereon by the occupying claimants. This the appellant contends was an erroneous theory. The action by one

co-tenant against another for an accounting for rents is a liberal and equitable action, and equitable defences may be made, and in such a case if the excluded tenant receives actual compensation for the damages sustained, he has no just ground of complaint. Unless, therefore, some peculiar circumstances are shown, the owner of an undivided interest in land who occupies the whole estate in good faith, under claim and color of title to the whole, and has made permanent and valuable improvements under the mistaken belief that he is the owner of the whole estate, is accountable only for the fair rental value of the property in the condition in which it was when it went into his possession.

The excluded owner or tenant is not, under ordinary circumstances, entitled to the enhanced rental value resulting from the improvements made with the capital of the *bona fide* occupant, or by his grantor from whom he purchased. *Morrison v. Robinson*, 31 Pa. St. 456; *Pickering v. Pickering*, 63 N. H. 468.

This rule is in analogy to that prescribed by the statute governing the rights and liabilities of occupying claimants, and has, besides, the support of reason and authority. *White v. Stuart*, 76 Va. 546, 567; *Early v. Friend*, *supra*.

The defendant, and his grantor who made the improvements, went into possession of the whole lot under a duly acknowledged and recorded deed, to which the plaintiff's name as well as that of her husband appeared to have been signed. It turned out that the plaintiff's signature thereto was without authority, and the persons in possession were the owners of only an undivided two-thirds of the property after the death of the husband. It could hardly have been expected that they would surrender the whole lot upon the institution of the suit by the plaintiff, notwithstanding the deed from Ira K. Carver and wife, which appeared to have been made in 1857, nor were they bound to have the prop-

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erty lie idle, unproductive and unimproved, or take the chance of paying an enhanced value for the improvements which resulted from their own enterprise. *Ford v. Knapp*, 102 N. Y. 135 (55 Am. Rep. 782).

This results in no injustice to the plaintiff, while to adopt the measure of damages contended for would be inequitable and injurious to the defendant.

While a tenant in common who disseizes his co-tenant and makes improvements on the common estate may not be entitled to compensation for improvements so made, he is nevertheless entitled to have them considered when called to account in an equitable action for rents and profits.

There are no circumstances disclosed in the present case which equitably entitle the appellant to the rental value of the land with the improvements. What the rights of the parties may be in respect to the improvements, in any other proceeding than the present, is not here considered nor determined. These considerations lead to an affirmance of the judgment.

Judgment affirmed, with costs.

Filed Dec. 11, 1888.

O'Boyle *et al.* v. Thomas, Trustee.

No. 14,441.

O'BOYLE ET AL. v. THOMAS, TRUSTEE.

WILL.—Construction.—Effect of Subsequent Clauses upon Devise.—Where an estate in fee simple is devised in one clause of a will in clear and decisive terms, it can not be taken away or cut down by raising a doubt upon the meaning of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving the estate in fee. For a will set out and construed, see opinion.

From the Vermillion Circuit Court.

J. Jump and *J. C. Davis*, for appellants.

B. Harrison, *W. H. H. Miller* and *J. B. Elam*, for appellee.

Howk, C. J.—On the 10th day of March, 1885, one William Collett, being embarrassed financially and unable to pay his debts as they matured, made a voluntary assignment of all his property, real and personal, in trust for the benefit of all his creditors, to the appellee, Leslie D. Thomas, who accepted such trust. William Collett acquired his title to the real property described in such assignment by devise under the last will and testament of his father, Josephus Collett, deceased, and from no other source. In 1872 said Josephus Collett died testate, in Vermillion county, Indiana, and on the 24th day of February, 1872, said last will and testament was duly admitted to probate in the proper court of that county. Under the devise therein to him, said William Collett took possession of the real property devised thereby to him, and claimed to be the owner thereof in fee simple. After his execution of such voluntary assignment, it was questioned whether the said William Collett, by the terms and provisions of such last will and testament, took an absolute and unconditional estate, in fee simple, in the real property so devised to him therein, and assigned by him to appellee, Thomas,

116	243
135	371
116	243
143	116
116	243
145	195
146	482
116	243
156	381
118	243
158	75
116	243
168	172
116	243
171	384

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in trust for the benefit of his creditors. To remove all doubts on this question, appellee, Thomas, commenced this suit to obtain a judicial construction of such last will and testament, and to quiet his title, as assignee and trustee in such voluntary assignment, in and to the real property so assigned to him.

Appellants were made defendants in such suit as the only persons in being who could, in any contingency, claim an interest in such real property adversely to appellee's title. Defendants answered by general denials of the complaint. The cause was submitted to the court for final hearing, and a finding was made in plaintiff's favor, and over defendants' motion for a new trial a decree was rendered as prayed for in the complaint.

Error is assigned here by appellants upon the overruling of their motion for a new trial. The case is before us on the evidence, and the only question for our decision may be thus stated: By the terms and provisions of the last will and testament of Josephus Collett, deceased, what estate did his son, William Collett, take in the real property devised to him? The devise to said William Collett is found in item second of the testator's will, and is expressed in these words, namely:

"I devise to my son, William Collett, who is the son of Fanny Malone, those certain tracts or parcels of land situate in Vermillion county, in the State of Indiana, and described as follows, to wit:" (Description omitted). "The said William Collett to have and to hold all the lands aforesaid in fee simple to himself and his heirs forever."

This is all of item 2d of the testator's will, with the exception of the description of the lands devised. If it were all of such will, there would be no room for even the slightest doubt in relation to the estate which William Collett would take in the real property devised to him by the testator. By plain, apt and unequivocal words, having a clear legal meaning and needing no interpretation, the testator devises to his son, William Collett, in the second item of his

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will, an absolute and unconditional estate, in fee simple, in the tracts or parcels of land described therein. But it is claimed that the devise to William Collett, in the second item of the testator's will, is so controlled by the provisions of the third item of such will as to show the testator's intention that William Collett, in a certain contingency, should take no more than an estate for his own life in the lands devised to him. This third item of the will reads as follows, to wit:

"Item 3d. I devise to Eliza Collett, sister of the said William Collett and daughter of the said Fanny Malone, during her natural life, those certain tracts and parcels of land situate in Vermillion county, and State of Indiana, and described as follows, and the rents, issues and profits thereof, to wit:" (Description omitted). "And it is further my will and design that the fee simple of the said lands, last before described and devised to the said Eliza Collett during her natural life, shall vest in the children of her body begotten, who are or may be living at the time of her death; but, in case of her death without a child or children surviving her, then said lands and the fee simple therein shall descend to and vest in her said brother, the said William Collett, if he shall be living, or, if he be dead, then to the heirs of his body begotten. But should the said Eliza die leaving no child or children, and should her said brother William be dead at the time of her death and should there be no child or children of the said William living at the time of her death, then the above lands devised to her, the said Eliza, during her natural life, shall descend to and the fee simple thereof vest in my nephews, John Collett, Stephen S. Collett and Josephus Collett, or the survivors of them living at the time of her death, share and share alike.

"And in the event of the death of the said William Collett, without a child or children or their descendants surviving him, before the death of the said Eliza Collett, then the said lands hereinbefore devised to the said William shall go

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to and vest in the said Eliza during her life; but, if she be dead, then it shall descend to and the fee simple thereof vest in the children of her body begotten then living, and the descendants of any deceased child or children, and if she be dead and there should be no child or children, lawful issue of her body, or their descendants, living at William's death to inherit as above provided, then the said lands devised to the said William shall go to and the fee simple thereof vest in my said nephews, John Collett, Stephen S. Collett and Josephus Collett, or the survivors of them living at the time of the said William's death."

It will be observed that, in the first part of this third item of his will, the testator devised the tracts of land therein described to his daughter, Eliza Collett, during her natural life, and then disposed of the fee simple estate in those lands to the persons named as devisees, after the termination of such life-estate. This devise is perfect and complete, as by it the testator disposed of all his estate in the lands so devised, none of which are involved in this litigation. We refer to this devise merely to show that, when the testator intended to devise an estate for life only, with remainder over, he knew and used apt and legal words and phrases to express such intention.

But it is apparent, we think, that in the last sentence or paragraph of the third item of his will, the testator manifested an intention to cut down the absolute and unconditional estate in fee simple which he had devised to his son, William Collett, in the second item of such will, in the lands described therein, to an estate merely for the life of his said son, and to reserve to himself the disposition of the remainder over, in such lands, after the termination of his son's life-estate therein, in certain contingencies. The question for our decision, therefore, is this: Is this manifest intention of the testator expressed in such clear, certain and appropriate words as to render it controlling of the absolute, apt and unequivocal words used by the testator in the devise to his

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son, William Collett, in the second item of his will? We are of opinion that this question ought to be, and must be, answered in the negative.

We may premise that nothing is more clearly shown or expressed in the will under consideration than the testator's intention, wish and fixed determination to make a final disposition of all his estate, real and personal, in and by such will, and to avoid thereby any possible intestacy as to any part of such estate.

In the fourth item of his will, in speaking of his only legitimate son and future heir at law, after stating that he had theretofore conveyed to such son certain real estate, "and made advancements to him from time to time in money," the testator declared, of and concerning his said son, as follows: "It is now my will, purpose and design that my son, Edward Collett, shall in future neither inherit nor receive anything more or further from or out of my estate, either personal or real, of which I may die possessed or seized, as I have already given him as much as I intend he shall have from my estate."

In view of the provisions of the fourth item of the testator's will, it is certain, we think, that, if the closing sentence or paragraph of the third item of such will were allowed to qualify and control the positive, clear and appropriate language of the second item of the will, the effect would be not only to cut down the fee simple estate devised to said William Collett to an estate for his life only in the lands described in such second item, but to defeat the testator's "will, purpose and design," as expressed in such fourth item, by the possible intestacy of the testator, as to such lands, in certain contingencies.

The provisions of the closing sentence or paragraph of the third item of the will are manifestly imperfect and incomplete, and are not in harmony, but in direct conflict with the apparent and expressed intention of the testator, as we gather the same from the entire will.

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In *Bailey v. Sanger*, 108 Ind. 264, it was held by this court that where, as here, an interest or estate is given, in clear and decisive terms, in one clause of a will, "such interest or estate can not be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate." The doctrine of the case cited is well supported by authority, and is directly applicable to, and, we think, is decisive of the case in hand, as stated in this opinion. *Thornhill v. Hall*, 2 Clark & Fin. 22; *Collins v. Collins*, 40 Ohio St. 353; *Hochstedler v. Hochstedler*, 108 Ind. 506; *Allen v. Craft*, 109 Ind. 476.

In conclusion, we are of opinion the court below correctly held and decided in this case that, under the last will of Josephus Collett, deceased, his son, William Collett, took and held an absolute and unconditional estate, in fee simple, in the lands devised to him in the second item of such will. The motion for a new trial was properly overruled.

The judgment is affirmed, with costs.

Filed Dec. 12, 1888.

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No. 12,134.

COLT ET AL., EXECUTORS, v. MCCONNELL ET AL.

MORTGAGE.—*Consideration.*—*Contract.*—*Care and Attention.*—V., being in ill health, was much at the house of Mrs. M., and at his request was nursed and cared for by her. In return for the services rendered and the kindness shown him he often promised her that, as a just compensation, he would, as soon as his father—who was aged and very wealthy, and from whom he had great expectations—should die, pay Mrs. M. a sufficient sum of money to remove all encumbrances from her homestead. After the death of his father, V. paid to Mrs. M. the amount required to remove the encumbrances from her property, declaring that he intended it as a compensation for her services and kindness to him. Fearing that she might again encumber the property at the request of her husband or others, and to prevent that from being done, V. proposed that a mortgage be executed to him for the amount paid, promising to release it when thought best, and to provide in his will for its cancellation, in case of his death. The mortgage was executed accordingly, but V. died without having released it or provided for its cancellation. Suit by his executors to foreclose the mortgage. *Held*, that the mortgage is without consideration and can not be enforced, as the sum paid Mrs. M. was not a loan, but was the compensation for her care and services, as fixed by the valid and executed contract of the parties.

SAME.—*Judgment of Parties as to Consideration.*—*When Conclusive Upon Courts.*—Where the thing agreed upon as the consideration for a contract has no determinate money value, the judgment of the parties as to the sufficiency of the consideration will not be disturbed or annulled by the courts.

SAME.—*Parol Evidence.*—*Conduct, Declarations and Admissions.*—Parol testimony is competent to show the consideration of a mortgage, and evidence of the conduct and declarations of the parties in the course of their negotiations, and also the admissions of the mortgagee, are admissible.

SAME.—*Attorney and Client.*—*Privileged Communications.*—Where both parties are present, declarations to an attorney are not privileged communications.

BILL OF EXCEPTIONS.—*Long-Hand Report of Evidence.*—*Practice.*—The long-hand report of the evidence taken by the court stenographer must be brought into the record by bill of exceptions.

From the Steuben Circuit Court.

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S. Norris, J. A. Woodhull and W. M. Brown, for appellants.
J. Morris, C. H. Aldrich and J. M. Barrett, for appellees.

ELLIOTT, J.—The appellants' complaint seeks the foreclosure of a mortgage executed by George W. McConnell and his wife, Eliza McConnell, to secure a note executed by George W. to the appellants' testator, Cornelius Vanderbilt.

The second paragraph of the answer of Eliza McConnell avers that "the plaintiff's testator, being in ill health and subject to epileptic fits and other diseases, had been much at her house, and that she, when he was so at her house, and at his request, nursed and cared for him with the same attention and assiduity as if he had been her own son; that he was often in such condition as to require the constant time of herself and family; that he was in the habit of travelling about the country, and when so travelling said testator required the constant care and attendance of one or two persons, and was sometimes out of money; that, at his request and by her procurement, her son William often attended him in his travels, and from time to time furnished him with such small sums of money as his immediate wants required. The defendant further says that she and her family were, during all said time, residing upon the land described in said complaint, as a homestead to which she was greatly attached; that, though said land equitably belonged to her, the title thereto had been placed in Mrs. Darling, who had, as the friend of this defendant, removed therefrom an encumbrance of between four and five thousand dollars, and taken the title to said land to secure the sum so advanced by her, all of which was during all of said time well known to said testator. And this defendant further says that the said Vanderbilt, in his lifetime, and before the execution of said mortgage, appreciating her care for and great kindness toward him, often promised her that, as a just compensation for said services and kindness, he would, as soon as his father, who possessed great wealth, and from whom said testator had great expect-

tations, and who was then very aged and infirm, departed this life, pay to her a sufficient sum to remove all encumbrance upon her said homestead and secure the same to her as her own, and as a homestead for her declining years, so that she could forever hold the same free from the claims of the creditors of her husband; that shortly before the execution of the said mortgage the said Vanderbilt, being then in life, came to her house, his father shortly before that having died, and he having received from his father's estate over a million dollars, and proposed to relieve and make good his promises to her so made, as hereinbefore stated, by paying to her the sum of six thousand five hundred dollars, the amount required to remove the encumbrances on her said homestead, and place the same in a reasonably fit condition for use and occupancy; that he declared that he intended said sum as a compensation for said services and kindness rendered him by this defendant, as hereinbefore stated; that thereupon the said Vanderbilt paid her said sum, with which her said homestead was disencumbered and the title reconveyed to her; that the said testator then expressed fears that she might, through the persuasion of her husband, and to oblige him, again encumber said property as she had before done, and that to prevent anything of the kind she had better convey it to him in trust for her, or execute to him a mortgage upon the same, of six thousand five hundred dollars, which he would at any time when thought best release, and that he would provide by his will for its cancellation, in case of his death; that she thought that it would protect her against the importunities of her husband and his creditors to execute a mortgage as proposed, and having the utmost confidence in the good intentions of said Vanderbilt and his kindly feelings toward her, she agreed at once to execute such a mortgage; that to give apparent force and validity to said mortgage, it was proposed that her husband and co-defendant should execute his note for said sum, and that the mortgage should be so drawn as to purport to secure said note; that

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thereupon she and her husband executed the mortgage in said complaint mentioned for the purpose and upon the conditions herein stated, and for no other consideration whatever. Hence she says that the said mortgage was, and is, without consideration, and void as to her."

We hold, as did the trial court, that this answer states a defence to the cause of action declared on.

It is a familiar rule that the consideration of a mortgage or deed may be proved by parol. It is an equally familiar rule that a mortgage executed without consideration can not be enforced. This mortgage is not, according to the averments of the answer, supported by any consideration.

The agreement between Mrs. McConnell and Mr. Vanderbilt that he would pay her for her care, services, and attention six thousand five hundred dollars, is supported by a sufficient consideration. Where, as here, the thing agreed upon as the consideration has no determinate money value, the judgment of the parties as to the sufficiency of the consideration will not be disturbed or annulled by the courts. *Wolford v. Powers*, 85 Ind. 294 (44 Am. Rep. 16); *Sinker, Davis & Co. v. Green*, 113 Ind. 264; *Johnson v. Moore*, 112 Ind. 91; *Price v. Jones*, 105 Ind. 543; *Scott v. Scott*, 105 Ind. 584; *Proctor v. Heaton*, 114 Ind. 250, op. p. 253.

In *Price v. Jones*, *supra*, *Earl v. Peck*, 64 N. Y. 596, and *Cowee v. Cornell*, 75 N. Y. 91, the rule we have stated was applied to cases in all their essential features the same as that before us for judgment. The contract between Mrs. McConnell and Mr. Vanderbilt, therefore, made her own, as fully as it was possible for any contract to do, the sum represented by the note and mortgage sued on, and, as she was of perfect right entitled to the sum, it follows, as clearly as effect follows cause, that there is no consideration for the instruments on which the complaint is founded. The sum she received was not borrowed, but was her own by virtue of her contract. For the mortgage there was absolutely no consideration, as the sum paid her was by the contract of the

parties fixed as the value of her care and services. What she received, to put the same proposition in another form of words, was pay for her services and care, not for money advanced or loaned to her.

The consideration was not past or executed. She was rendering continuous services, and for these the testator promised her compensation, and, in fulfilment of that promise, paid her six thousand five hundred dollars. The contract was, therefore, not an executory agreement, but an executed one. It was executed by the payment of the sum agreed upon, and no longer remained executory. According to the confessed allegations of the answer, the agreement, out of which sprang the mortgage, was not made until after the consummation of the original contract which vested the money agreed to be paid for her services absolutely in her. It thus appears that the sum she received was upon the contract, and that it was paid in execution of that contract. It further appears, we may add, that the mortgage was not executed to secure the sum paid to Mrs. McConnell, but for an entirely different purpose, that of securing to her the property and protecting her against future importunities of her husband.

The facts pleaded do not impeach the conveying properties of the mortgage; they simply impeach its consideration. The theory of the pleading is, that the mortgage is without consideration, and, therefore, ineffective. This theory is sound. There is nothing in *Bever v. North*, 107 Ind. 544, that conflicts with this doctrine. It is expressly declared in that case that a deed or mortgage may be shown to be without consideration, and the cases of *Hays v. Peck*, 107 Ind. 389, *McDill v. Gunn*, 43 Ind. 315, *Carver v. Louthain*, 38 Ind. 530, *Pitman v. Conner*, 27 Ind. 337, and *Allen v. Lee*, 1 Ind. 58, were fully approved. What was decided in *Bever v. North*, *supra*, is, that while a party may impeach the consideration of a deed, he can not, where there is a consideration, destroy its qualities as a conveyance by parol evidence.

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It was said in that case, after declaring that the consideration might be impeached, that "But the exception to the general rule does not permit the introduction of parol evidence to defeat the operation of the deed by rendering nugatory the words of conveyance which it contains, and a grantor can not, under the guise of proving the consideration of a deed, prove that it was not to operate as a conveyance." The case commented on does not, it is evident, support the appellants; on the contrary, it is against them, for it affirms quite as strongly as any of our cases, that a deed or mortgage may be shown to be without consideration.

The contention that there was, upon the facts pleaded, an incomplete gift can not prevail. There was a contract, services were rendered under it, and the contract was executed by the payment of the agreed compensation. There was neither a trust nor a gift. There was a contract and performance. No one, of course, doubts that an incomplete gift may be revoked; but the argument founded on this rudimentary doctrine is radically unsound, for it rests upon an illegitimate assumption, neither proved nor susceptible of proof, and that assumption is that the transaction was in the nature of a gift.

The cases of *Sherman v. Sherman*, 3 Ind. 337, and *Denman v. McMakin*, 37 Ind. 241, have not the remotest application to this case. The money, we are forced by the course of the argument to repeat, was paid for the services rendered under the contract; that contract was neither abandoned nor rescinded, but, on the contrary, was carried into execution, and the mortgage was not executed to secure the money paid Mrs. McConnell.

The fallacy of counsel is in assuming that there was no executed contract preceding the mortgage, and this fallacious assumption pervades and poisons their entire argument. They assume without right that the consideration of the mortgage was this money, whereas the consideration for the money was the services rendered by Mrs. McConnell, and as those ser-

vices were the equivalent of the money, not a penny remained to constitute a consideration for the mortgage.

It results from the principles we have already stated that parol testimony was competent to show the consideration of the mortgage. In showing what the real consideration was, it was proper to prove the details of the transactions between the parties, and the attendant circumstances. This proof could not be made without giving evidence of the conduct and declarations of the parties, and these were, therefore, competent.

Of course we do not mean to say that declarations of Mrs. McConnell, made in the absence of the testator, and not forming part of the thing done, were competent; but we do hold that where they formed part of the transaction between the parties, no matter at what point they were made, they were admissible. Where there is a series of transactions, bound together and resulting in one consummated contract, all that is said and done by the parties in the course of their negotiations, and as part of the consummated agreement, are competent in all cases where they are relevant and affect the question of consideration. If this were not the rule, the true consideration of an instrument could very seldom be ascertained.

It was clearly competent to prove the admissions of Vanderbilt. If those admissions tended to show, as they did, that the consideration of the mortgage was not the money placed in the hands of Mrs. McConnell, they were relevant and material, notwithstanding the fact that they may have contradicted the recitals of the mortgage. They were not rendered incompetent, for they were relevant to the question of consideration, although they tended to prove that the mortgage did not secure the debt it purported to secure. If, in fact, the mortgage was not executed upon that consideration, but for a different purpose, and without consideration, Mrs. McConnell had a right to prove it, notwithstanding the recitals of that instrument.

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Where both parties are present, declarations to an attorney are not privileged communications. *Hanlon v. Doherty*, 109 Ind. 37, *vide op.*, p. 43; *Weeks v. Argent*, 16 M. & W. 817; *Dunn v. Amos*, 14 Wis. 106; *Mobile, etc., R. R. Co. v. Yeates*, 67 Ala. 164; *Gulick v. Gulick*, 39 N. J. Eq. 516; *Whiting v. Barney*, 30 N. Y. 330; *Hebbard v. Haughian*, 70 N. Y. 54; 1 Whart. Ev., section 587.

We have decided as many of the questions as we can with propriety consider in the condition in which the record comes to us—we have, indeed, probably decided more—for the evidence is not properly in the record. The paper purporting to contain the evidence has no caption, and it is thus authenticated:

“I hereby certify that the foregoing is a true, complete and correct transcript of the evidence in the case of Colt v. McConnell, as taken from my short-hand notes.

“FRANK B. SLATTNER, Reporter.

Attest: R. WES. MCBRIDE, Judge.”

The evidence is, it is very clear, not brought into the record in the method the law requires. *Wagoner v. Wilson*, 108 Ind. 210; *Stone v. Brown, ante*, p. 78.

Although we have probably discussed more of the questions arising on the trial than it was strictly proper for us to do, the appellants, at all events, can not complain.

Judgment affirmed.

Filed Dec. 12, 1888.

The Louisville, New Albany and Chicago Railway Co. v. Soltweddle.

No. 13,037.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. SOLTWEDDLE.

RAILROAD.—*Street.*—*Ejectment.*—*Acquiescence.*—*Estoppel.*—*Damages.*—One who stands by and acquiesces in the construction of a railroad track across a street upon which his property abuts, and makes no objection until after the track becomes part of a completed railroad line and the interests of the public have attached, can not maintain ejectment, his remedy being a proceeding for damages.

From the Lake Circuit Court.

G. W. Easley, G. R. Eldridge, S. O. Bayless and W. H. Russell, for appellant.

MITCHELL, J.—Soltweddle sued the railway company in ejectment to recover possession of real estate, and also to recover damages for injuries occasioned by the construction and operation of the company's railroad over the plaintiff's land. The action was commenced on the 27th day of March, 1885, and such proceedings were had as that, on the 25th day of May, 1885, judgment was rendered in the Lake Circuit Court in favor of the plaintiff. The court made an order directing that a writ issue to the sheriff of Lake county, commanding him to put the railway company out, and put the plaintiff into possession of the land described in the complaint. It was further ordered and adjudged that the defendant pay the plaintiff one hundred and seventy-five dollars as damages.

The question is presented whether or not under the pleadings and evidence the judgment can be maintained. We are not favored with a brief or other argument on appellee's behalf. Recent decisions of this court settle the question conclusively in the negative.

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It appeared in evidence that, at the time the action was commenced, the plaintiff was the owner of lot number 33, in one of the additions to the city of Hammond, in Lake county, and that the front of his lot abutted on Fayette street. In December, 1883, the railroad company, whether with or without the consent of the municipal authorities does not appear, constructed its road in such a manner as that its line ran diagonally across Fayette street, in front of the northeast corner of the plaintiff's lot.

The purpose of the action was to eject the railroad company from and to recover possession of so much of the street occupied by the company's track as lay in front of the plaintiff's lot, and to recover damages for the obstruction of the street, and for injury to the plaintiff's property occasioned by the construction and operation of the road. There was no dispute but that the road had been fully completed and put into operation more than a year before the suit was commenced.

It did not appear that the plaintiff took any steps to prevent the location or construction of the road in front of his lot, or that he was not fully apprised that it was being constructed. Having, so far as appears, stood by and acquiesced while the work of construction was in progress, and until the interest and convenience of the public became involved, he is in no position now to arrest the operation of the road by evicting the railroad company from a part of its line. The law plainly is, that a land-owner who surrenders possession of his land to a railroad company without prepayment, and by express or implied acquiescence induces the company to expend money in constructing and equipping its road, can not afterwards maintain ejectment and recover his land.

This subject has been so fully considered in recent decisions of this court that further consideration of it here is unnecessary. *Midland R. W. Co. v. Smith*, 113 Ind. 233; *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581; *Evansville, etc., R. R.*

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Co. v. Nye, 113 Ind. 223; *Bravard v. Cincinnati, etc., R. R. Co.*, 115 Ind. 1; *Sherlock v. Louisville, etc., R. W. Co.*, 115 Ind. 22.

The foregoing authorities make it clear that the plaintiff is now confined to the recovery, by the appropriate method, of such compensation and damages as he may be entitled to on account of the location and construction of the road.

The judgment is reversed, with costs, with directions to the court below to sustain the appellant's motion for a new trial.

Filed Dec. 12, 1888.

No. 13,012.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY v. OSTRANDER.

RAILROAD.—Negligence.—Communicating Fire to Adjacent Property.—Presumption.—Burden of Proof.—No presumption of negligence arises against a railroad company from the fact of fire being communicated to adjacent property by an engine in use upon its line, and where negligence is charged the burden of proof is on the party complaining.

SAME.—Use of Wood in Coal-Burning Engines is Negligence.—Instruction to Jury.—Where the fact that the use of wood in a coal-burning engine materially increases the danger of setting fire to and burning adjacent property is indisputably established, the court may properly instruct the jury that such use constitutes negligence.

INTERROGATORIES TO JURY.—Contradictory Answers.—Venire de Novo.—The fact that answers to special interrogatories propounded to the jury are contradictory or inconsistent with each other, affords no ground for a *venire de novo*, as they neutralize each other and the general verdict will stand unimpaired.

SAME.—Objection to Reception of Verdict.—Waiver.—Practice.—Where the jury has failed to answer a material interrogatory, or has answered it

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116	259
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116	259
160	23

116	259
163	536
163	595

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imperfectly, or has omitted to suitably verify the answer by the signature of its foreman, the proper practice is to object to the reception of the verdict and the accompanying papers pertaining to the interrogatories. If the verdict and accompanying papers are received without objection, the party complaining can not afterwards have a *venire de novo*, or other relief from the failure of the jury in any of the respects stated.

SAME.—Conclusions of Law.—Harmless Error.—It is only concerning some particular question of fact material to the cause that an interrogatory can be rightly submitted to the jury under section 546, R. S. 1881. It is error to require a jury to answer an interrogatory which calls only for a legal conclusion; but the error will be harmless where the answer is immaterial.

SAME.—Presumptions in Favor of General Verdict.—Where the answers of the jury to interrogatories are not conclusive of the merits of the controversy, all the presumptions are indulged in favor of the general verdict.

From the Vigo Circuit Court.

W. Armstrong, W. H. Lyford and L. D. Thomas, for appellant.

H. C. Nevitt and D. N. Taylor, for appellee.

NIBLACK, J.—Joseph W. Ostrander was, at the time of the trial of this cause, and for many years previously had been, the owner of a tract of land in Vigo county constituting a farm, and lying adjacent to a line of railroad operated by the Chicago and Eastern Illinois Railroad Company.

About the last day of July or the first day of August, 1881, an excursion train belonging to that company passed Ostrander's farm going north. The season was at that period a very dry one, and soon after the train had passed a fire broke out on Ostrander's land contiguous to the railroad line, which resulted in burning a part of a line of his fence and in destroying a considerable number of his fruit trees.

Ostrander thereupon commenced this action against the railroad company for the damages resulting from the fire, upon the ground that the company had negligently caused the injury to be inflicted.

The complaint was in four paragraphs. The first charged, in general terms, that the defendant had negligently set fire

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to and destroyed the plaintiff's property. The second averred that the defendant, by its engine, had set fire to certain combustible materials which had been allowed to accumulate on its right of way, and had negligently permitted the fire thus set by it to escape on to the plaintiff's adjacent land, thereby inflicting the injury sued for. The third was based upon the alleged ground that, by reason of defective netting in the smoke-stack of the defendant's engine, fire had escaped and destroyed the property for which damages were demanded. The fourth complained that the defendant had negligently permitted combustible materials to accumulate on its track and adjacent right of way; that it had negligently suffered fire to be emitted from its engine and to set fire to such combustible materials, and that it had further negligently suffered the fire to escape and to spread on to the plaintiff's land, to his injury as alleged.

There was a general verdict for the plaintiff, assessing his damages at \$405. This verdict was accompanied by answers to interrogatories propounded to the jury, at the request of the plaintiff, as follows:

"1. Did the engine of defendant, by throwing sparks, set fire to plaintiff's property?" Answer. "Yes."

"2. Was the engine which set fire to plaintiff's property properly equipped with a good spark-arrester?" Answer "Not satisfied from the evidence that it was."

"3. Was the spark-arrester in the engine of defendant defective?" Answer. "Not satisfied."

"4. Was there any negligence on the part of plaintiff, Ostrander, that contributed to the injury complained of?" Answer. "No."

"5. Was the plaintiff's property destroyed by the negligence of defendant, and without any negligence of plaintiff?" Answer. "Yes."

"6. Was there negligence by defendant in the use of fuel on the engine which caused the fire?" Answer. "Yes."

"7. Did the negligent use of wood fuel on defendant's

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engine cause the emission of sparks which kindled the fire that destroyed plaintiff's property?" Answer. "Not satisfied on this subject by the evidence."

The general verdict was also accompanied by answers to other interrogatories submitted to the jury at the defendant's request, to the following effect:

"1. Did the defendant have competent servants in charge of its engine which is claimed to have caused the damage in this cause?" Answer. "Not satisfied that it did."

"2. Did the defendant have in use on its engine in question in this cause the most approved spark-arrester then known?" Answer. "Yes."

"3. Did the defendant use reasonable care to keep said spark-arrester in good repair?" Answer. "Not satisfied that it did."

"4. Did the defendant use due diligence to keep its right of way free from combustible materials?" Answer. "Yes."

"5. Did the defendant use due diligence to prevent the escape and spread of fire?" Answer. "From the evidence we don't know."

"6. Did the fire originate on defendant's right of way?" Answer. "Not sufficient evidence to answer whether it did or not."

"7. Did the plaintiff use such reasonable diligence and means as were at his command to extinguish, or prevent further escape of, the fire from the right of way to his property, after he saw the fire, or to prevent its spread after he saw it burning?" Answer. "Yes."

"8. Was the spark-arrester used on defendant's engine in good and proper order when it started on that trip?" Answer. "Not satisfied from the evidence that it was."

"9. Did the defendant use wood on the engine in question simply and necessarily for the purpose of kindling its fire just previous to and while starting out from Terre Haute on the trip in question?" Answer. "Yes."

Upon a return of the verdict, the defendant moved for a

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venire de novo upon the grounds: First. That some of the interrogatories were imperfectly answered. Second. That some of the answers to interrogatories were contradictory and inconsistent with each other. Third. That some of the answers in question were not separately signed by the jury. That motion being overruled, the defendant moved for judgment in its favor upon the answers to the interrogatories, notwithstanding the general verdict, and that motion being likewise overruled, the defendant moved for a new trial, basing its motion upon various exceptions reserved at the trial, with the same result.

The fact that answers to special interrogatories are contradictory, or inconsistent with each other, affords no ground for a *venire de novo*. Where such answers are only contradictory, or inconsistent, they neutralize each other and permit the general verdict to remain unimpaired. *Rice v. Manford*, 110 Ind. 596.

Where the jury has failed to answer an appropriate and material interrogatory, or has answered it defectively or imperfectly, or has omitted to verify the answer in some suitable way or place by the signature of its foreman, the proper practice is to object to the reception of the verdict, and the accompanying papers pertaining to the interrogatories.

Where, as in this case, the verdict and such accompanying papers are received without objection, the party complaining can not afterwards have a *venire de novo*, or any other relief, from the failure of the jury in any of the respects stated. 1 Works Practice, sections 842 and 855, *et seq.*; *West v. Cavins*, 74 Ind. 265; *Bedford, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551; *Pittsburgh, etc., R. W. Co. v. Hixon*, 110 Ind. 225.

It was, in brief, held in the case of *Indianapolis, etc., R. R. Co. v. Paramore*, 31 Ind. 143, that as the business of operating railways is a lawful business, no presumption of negligence arises from the fact of fire being communicated by an engine in use upon a railway, and that where the negligent

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communication of fire by an engine is charged, the burden of proof is on the party complaining.

The doctrine of that case was inadvertently disapproved in the more recent case of *Pittsburgh, etc., R. W. Co. v. Hixon*, 79 Ind. 111, but was reaffirmed when this latter case was again before this court (see *Pittsburgh, etc., R. W. Co. v. Hixon*, 110 Ind. 225), and is now, as formerly, the recognized law of this State in all cases in which it is applicable.

Counsel for the appellant contend that the answers to the interrogatories, relatively considered, either expressly by what they affirmed or impliedly by what they failed to affirm, found in favor of their client on all the specifications of negligence contained in the last three paragraphs of the complaint, and that, consequently, the appellee was not entitled to a judgment upon any one of those paragraphs; also, that no facts were specially found, or evidence introduced, which tended to sustain the first paragraph of the complaint, and that, for that reason, it was error to award him judgment on that paragraph. In support of this latter contention it is insisted that the answers to the fifth and sixth interrogatories submitted at the request of the appellee, were mere conclusions of law, and hence not findings upon particular questions of fact within the meaning of section 546, R. S. 1881. This position is well sustained directly, as well as indirectly, by the authorities.

It has practically become a legal maxim in this State that negligence is a mixed question of law and fact, and is a question of law where the facts are undisputed, and the inference to be drawn from them unequivocal. *Gagg v. Vetter*, 41 Ind. 228; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *City of Indianapolis v. Cook*, 99 Ind. 10.

But no question of negligence as a legal proposition arises until the facts from which negligence is supposed to have resulted are in some manner established. The answers under consideration were, consequently, mere legal conclusions, not resting upon any given or specific facts, and of no practical

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value as supporting the first paragraph of the complaint. This view is in strict accord with the case of *Toledo, etc., R. W. Co. v. Goddard*, 25 Ind. 185, and generally with other more recent cases. *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151.

There is probably no subject in which the *nisi prius* courts so frequently fail in their duty as they do in permitting improper interrogatories to be submitted to juries. It is only concerning some *particular question of fact material to the cause* that an interrogatory can rightly be submitted. It is error, therefore, to require a jury to answer an interrogatory which calls only for a legal conclusion. It often happens, as in this case, that such an error is a harmless one, upon the ground of the immateriality of the answer, but the submission of such an interrogatory is always, at least, an abstract error, which is calculated to confuse, if not mislead, the jury.

In a case like this, where the answers to the interrogatories are not conclusive of the merits of the controversy, all the presumptions are indulged in favor of the general verdict. *Indianapolis, etc., R. R. Co. v. Petty*, 30 Ind. 261; *Graham v. Graham*, 55 Ind. 23; *Scott v. Zartman*, 61 Ind. 328; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88.

There was evidence as to the unusual size and great number of sparks which were permitted to escape from the engine from which the jury might have inferred negligence in setting fire to the appellee's property.

While there were many things brought out at the trial unfavorable to the appellee's right to recover, we have no sufficient reason for reversing the judgment on the evidence.

Objections are urged to several of the instructions given at the trial, but these objections are referred to in such a casual and merely incidental way as not to require us to make any formal rulings upon them.

The judgment is affirmed, with costs.

Filed Jan. 21, 1888.

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ON PETITION FOR A REHEARING.

NIBLACK, J.—Complaint is made that we erred in holding that the argument submitted against the correctness of certain instructions given to the jury, was insufficient to require us to review those instructions, and for that reason, as well as for alleged errors in giving two of the instructions referred to, we are asked to grant a rehearing in the cause. Counsel for the appellant, in their original brief, said: "We believe the court below erred and misled the jury by giving instructions Nos. 17, 18, 19, 20 and 21 asked for by the appellee. In each of these instructions the court tells the jury that the use of wood in coal-burning engines, except in kindling fire before starting out, is negligence on the part of a railroad company."

They then quoted from instruction No. 19, in which the jury were told: "And if you further find that wood was used on said engine, except such as was necessary as kindling before starting out, instead of coal, then such use of wood would be negligence."

They also quoted from instruction No. 21, to the effect that if the engineer had timely notice "that his engine was to haul said train, it was his duty to have had sufficient fire to make steam without injury to property along the right of way," and that his failure to do so was negligence. They thereupon made the point that the court, in giving said instructions 19 and 21, invaded the province of the jury by making the propositions announced matters of law instead of questions of fact for the jury to decide, and consequently erred. In support of the point thus made, counsel quoted from *Small v. Chicago, etc., R. R. Co.*, 50 Iowa, 338, where it is said that "We regard it as sufficient if railroad companies employ the best known means and methods. What lies beyond the known it is not the province of courts or juries to consider."

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We have frequently held that where several instructions have been given in a cause, they must, upon an appeal to this court, be considered as a whole, and that is undoubtedly the correct general rule. It is also a well recognized rule that in construing a sentence or clause constituting a part of an instruction, the context must be taken into consideration, so that all the parts may be construed together.

We thought when this cause was heard, and still think, that the objection urged as above to a part of the instructions given at the trial, could not rightly be regarded as an argument either as against the sufficiency of any of the instructions as a whole, or as against any number of such instructions as a part of a series, to the extent of presenting any question for the decision of this court. But waiving all question of the sufficiency of the argument originally submitted by counsel, we see no substantial objection to the legal propositions announced by instructions 19 and 21, as applicable to the evidence in this cause.

It was established at the trial by undisputed evidence that there was an essential difference between the netting used to arrest sparks in a coal-burning engine and that used in an engine in which wood is burned, and that the use of wood in a coal-burning engine very materially increases the danger of setting fire to, and of burning, adjacent property.

In the case of *St. Joseph, etc., R. R. Co. v. Chase*, 11 Kan. 47, which was a case of the same class as this, the court said: "The fire was caused by the defendant's engines. The engines were all coal-burners. It is more dangerous to burn wood in coal-burners than to burn coal therein. The network fire-arresters of a wood-burner have finer meshes than the net-work fire-arresters of a coal-burner."

As was said in the opinion heretofore announced in this cause, when the facts are undisputed and well established, the question of negligence becomes a matter of law for the court.

As the fact that the use of wood in a coal-burning engine

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very materially increases the danger of setting fire to, and of burning, adjacent property was indisputably established in this case, the court below did not err in telling the jury, as it did in effect, that, in view of this established fact, the use of wood in a coal-burning engine engaged in propelling a train of cars constitutes an act of negligence.

The petition for a rehearing is overruled.

Filed Dec. 12, 1888.

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No. 13,437.

HERVEY v. KROST ET AL.

SHERIFF'S SALE.—*Redemption by Subsequent Mortgagee.*—Under section 774, R. S. 1881, a mortgagee, although his mortgage is executed after a judicial sale of the property, may redeem from such sale, if his mortgage is recorded within the year for redemption.

SAME.—*Redemption by Disqualified Person.*—*Estoppel.*—It is only the person holding the certificate of sale who may question the right of another to redeem, and if he, without objection, accepts the redemption-money from a disqualified person, he is estopped from denying the validity of the redemption.

SAME.—*Vacation of Sale.*—*Re-Sale.*—*Statute Construed.*—Section 770, R. S. 1881, providing that when real estate shall be redeemed by the owner or person claiming under him, the sale shall be vacated and the property again subject to sale, refers to redemptions made by the owner, his executor or administrator, his heirs or devisees, or one holding either the legal or equitable title under him or them, as provided in section 768 and 769.

SAME.—*Sale Extinguishes Lien.*—A sale made in pursuance of a judgment or decree of foreclosure extinguishes the lien of the judgment or mortgage as to the land sold, and the lien can be restored only when the sale has been vacated by a redemption by the persons contemplated by section 770.

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SAME.—When Redemption Does not Vacate Sale.—Redemption by a junior mortgagee, as such, or by any other person or persons except those included in section 770, does not vacate the sale and subject the property to re-sale on execution as if no sale had been made.

SAME.—Lien-Holder can not Redeem from his Own Sale and Re-Sell.—A mortgagee or judgment lien-holder, after he has once sold land upon an execution or decree, can not redeem from his own sale, in case it produces less than the whole amount of his judgment, and thereby restore the lien of the judgment and subject the property to re-sale as if no previous sale had been made. *Greene v. Doane*, 57 Ind. 186, and cases following it, holding a contrary doctrine, were decided upon a statute differing from that now in force.

From the Lake Circuit Court.

L. D. Thomas, for appellant.

MITCHELL, J.—This proceeding was instituted by Robert G. Hervey against John Krost and Rodman H. Wells, the latter being the sheriff of Lake county, to enjoin the sale of certain real estate.

The record discloses that Krost recovered a judgment in the Lake Circuit Court on the 3d day of October, 1883, against Josephus Collett and another, for a large sum of money, and that there was entered in the same proceeding a decree of foreclosure of a mortgage and an order for the sale of certain real estate owned by Collett, to satisfy the judgment so rendered.

In pursuance of the decree, the sheriff sold two separate parcels of real estate on the 17th day of November, 1883, Holton becoming the purchaser of one of the tracts, and Youche of the other. Subsequently both of the above named purchasers assigned their respective certificates of purchase to John P. Merrill. The judgment remaining partially unsatisfied, another tract of Collett's land was in like manner sold to John P. Merrill on the 15th day of November, 1883. The greater part of the judgment remained unsatisfied after the above mentioned sales, both of which were made at the request and under the direction of Krost, the judgment plaintiff. On October 28th, 1884, Collett executed a mortgage,

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covering the several tracts of land sold as above mentioned, to the plaintiff Hervey, to secure an indebtedness due the latter. After duly recording his mortgage, Hervey redeemed from all of the previous sales by paying the requisite amount of money into the clerk's office within one year from the date of the respective sales. Merrill, who held all the certificates of sale, recognized the plaintiff's right to redeem, and received the money which had been paid in as redemption-money. After the redemption by Hervey, and within one year from the respective sales, Krost, the judgment plaintiff, claiming the right to redeem and re-sell the property by *venditioni exponas*, in virtue of his unsatisfied judgment, paid to the clerk of the Lake Circuit Court the amount of money theretofore paid by the plaintiff Hervey as redemption money. It was to enjoin a re-sale by Krost that this suit was instituted.

The question is thus presented whether or not a judgment creditor, who causes the land of his debtor to be sold to satisfy an execution or decretal order, can redeem from a sale so made in case the land sells for less than the amount of his judgment?

We are not favored with a brief on behalf of the appellees, and are, therefore, without any argument in support of the judgment of the learned court below.

In the brief of appellant's counsel it is stated that the court below was of the opinion that the plaintiff was not within any of the provisions of the redemption law, and, therefore, not entitled to redeem from the sales made by Krost, and that if he could redeem he would stand in the shoes of Collett; that the redemption by him would simply vacate the previous sale and subject the land to re-sale.

Under section 774, R. S. 1881, "Any person having a lien, otherwise than by judgment, upon the real estate, or any parcel or parcels thereof sold in one body, may, at any time within one year from said sale, and after he shall have had

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his lien duly recorded where, by law, the record thereof is provided for, redeem," etc.

Within the provisions of the above section, a mortgagee, although his mortgage may have been executed after the sale, has the right of redemption secured to him, provided his mortgage shall have been duly recorded within the year for redemption. *Phillips v. Demoss*, 14 Ill. 410; *Pollard v. Taylor*, 13 Ala. 604; *Van Rensselaer v. Sheriff, etc.*, 1 Cow. 501; *Freeman Executions*, section 317.

The plaintiff seems to be within the terms of the above section. But the question of Hervey's right to redeem from the previous sales is one entirely between him and the purchaser whose purchases he redeemed from. Whether he had the right or not, he assumed that he had, and paid the clerk the proper amount as redemption-money. Merrill, the only person who had the right to raise any question, accepted the money so paid, and the redemption thereby became an accomplished, indisputable fact. *Goddard v. Renner*, 57 Ind. 532; *West v. Krebaum*, 88 Ill. 263; *Abadie v. Lobero*, 36 Cal. 390.

"If a redemption made by a disqualified person is acquiesced in by the purchaser or other person from whom the redemption is made, it will estop such person, after he has received the redemption-money, from denying the validity of the redemption." *Freeman Executions*, section 317.

Whatever right Krost had under the statute regulating redemptions of real estate, was in no wise affected by the redemption made by Hervey, nor is his right dependent in any respect upon the rights of the latter. Section 770 enacts that whenever any real estate shall be redeemed by the owner, or any part owner or persons claiming under them, the sale by the sheriff shall be wholly vacated, and the real estate shall be subject to sale on execution as if such sale had not been made.

This section refers to redemptions made by the owner, or by his executor or administrator, or any one holding either

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the legal or equitable title under him, in pursuance of the two preceding sections. It has no reference to redemptions made in pursuance of the provisions of succeeding sections.

When property is redeemed by any person or persons falling within the description of those designated in section 770, the effect of the redemption is to annul or vacate the sale, and the judgment upon which the sale was made, so far as it remains unsatisfied by the bid, again becomes a lien upon the land, and is reinstated to its former position. *Goddard v. Renner, supra*; *State, ex rel., v. Sherill*, 34 Ind. 57; *Bodine v. Moore*, 18 N. Y. 347.

Accordingly, it has been held that a redemption by one who took a conveyance from the judgment debtor of real estate previously sold at sheriff's sale, or by one who purchased the property at a sheriff's sale made subsequent to the sale redeemed from, simply annulled the first sale, and restored the property to the position it occupied before the sale, with the judgment lien or liens reinstated, for any sums remaining unpaid. *Cauthorn v. Indianapolis, etc., R. R. Co.*, 58 Ind. 14.

Redemption by a junior mortgagee, as such, or by any other person or persons except those included in section 770, does not have the effect to vacate the former sale, and subject the property to re-sale on execution as if no sale had been made.

After redemption has been made by persons entitled, under the provisions of section 774, the land may be redeemed from them upon the same terms and conditions as are required in case of redemption by judgment creditors under the previous sections.

We conclude, therefore, that the plaintiff had the right to and did redeem, and that the redemption by him did not vacate the previous sale, so as to subject the property to re-sale under section 770.

This brings us to consider the principal question in the case, and that is: May a mortgagee or judgment lien-holder,

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after he has once sold land upon an execution or decree, redeem from his own sale, in case it produces less than the whole amount of his judgment, and thereby restore the lien of his judgment and subject the property to re-sale as if no previous sale had been made?

The right to acquire a lien upon real estate by judgment, and the right to sell real estate either upon execution or decretal order, did not exist at common law, and is derived from and regulated entirely by the statute. "It begins, continues and terminates at the will of the Legislature." *Duke v. Beeson*, 79 Ind. 24; *Davis v. Rupe*, 114 Ind. 588 (595); *Gimbel v. Stolte*, 59 Ind. 446; *Houston v. Houston*, 67 Ind. 276; *Watson v. New York, etc., R. R. Co.*, 47 N. Y. 157.

Redemption is also a statutory right. "The statute creates the right, prescribes the time and method of its exercise, and designates the person entitled to exercise it."

While the courts favor and give a liberal construction to redemption laws in the interest of the debtor and others who are concerned that the debtor's property shall go toward the payment of his debts, to the full extent of its value, and to whom the right of redemption may be their only means of protection, it never could have been intended that redemption laws should afford a rapacious creditor the means of speculating out of the property and upon the necessities of his debtor.

Accordingly, a creditor who invokes the agencies of the law, and exposes the property of his debtor to sale, can thereafter do nothing either by way of redeeming or otherwise to defeat the title of a purchaser who purchased at the creditor's own sale, except by the authority of a statute fairly giving the right. *Wood v. Colvin*, 5 Hill, 228; *Clayton v. Ellis*, 50 Iowa, 590.

As respects the purchaser, and parties holding under him, and other creditors holding liens, the sale, although it only partially satisfies the judgment, nevertheless discharges the

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land sold from the lien, and exhausts the remedy of the creditor in respect to the property sold, subject to the contingency that the owner, or some one claiming under him, may redeem, in which case the sale is wholly vacated, and the lien of the judgment restored under the provisions of section 770. *God-dard v. Renner*, *supra*; *Amory v. Reilly*, 9 Ind. 490 (493), and cases cited; *Russell v. Allen*, 10 Paige, 249; *Todd v. Davey*, 60 Iowa, 532; *Escher v. Simmons*, 54 Iowa, 269; *Hayden v. Smith*, 58 Iowa, 285; *McCullough v. Rose*, 4 Bradwell, 149; *Lauriat v. Stratton*, 6 Sawyer, 339.

As is said in the case last above cited: "In the very nature of things the right to redeem is inconsistent with the right to sell."

There are no equitable considerations upon which such a right can be predicated. A creditor who directs the sale of his debtor's property is, in contemplation of law, present at the sale, and has the opportunity and is in condition to bid the fair value of the property, at least to an amount equal to the judgment upon which he exposes it to sale. If he bids less than the amount of his claim, or if he permits it to be sold for less, it should be conclusively presumed, as between him and the purchaser, and other creditors holding liens which entitle them to redeem, that the amount of the bid was the true value of the property to him. No good reason can be suggested why he should be afforded the opportunity to experiment, with a view of obtaining the property of his debtor at the smallest possible price, nor should he be permitted, under the guise of redeeming, to break down and annul his own sale, and expose the property again.

In *Greene v. Doane*, 57 Ind. 186, it was held that a statute regulating the redemption of real estate, which provided that "any mortgagee or judgment creditor having a lien upon the same may redeem such real property or interest therein, at any time within one year," authorized a judgment creditor to redeem where the amount bid at the sale was insufficient to satisfy the judgment.

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The theory upon which the decision proceeds is, that so much of the judgment as remained unsatisfied after the sale continued to be a lien on the real estate sold, and that the creditor who directed the sale was, therefore, a judgment creditor, having a lien upon the property sold, and was hence within the letter of the statute, and entitled to redeem from his own sale.

The reasoning of the learned judge who wrote the opinion in the case cited, takes no account of the universally accepted rule which declares that a sale made in pursuance of a judgment or decree extinguishes the lien of the judgment or mortgage so far as it affects the land sold, and that the lien can only be restored or reinstated by vacating the sale in some manner specifically prescribed by statute. *Greene v. Doane, supra*, was followed in later cases, and as long as the statute to which it gave a construction remained without substantial modification. *Teal v. Hinchman*, 69 Ind. 379; *Smith v. Moore*, 73 Ind. 388; *Duke v. Beeson, supra*.

In view of the decisions thus made, without regard to our opinion concerning the soundness of the reasoning upon which the initial decision was founded, but for the intervention of the Legislature we should have felt constrained, after the lapse of the intervening time, to acquiesce and continue in the line of that case. The Legislature has, however, changed the statute in a material respect.

Section 771, R. S. 1881, in force since April 11th, 1881, so far as relevant to the question under examination, reads as follows: "In the absence of a redemption as above provided, by any owner, part owner, or person claiming under either, the real estate sold, or any parcel or parcels thereof sold in one body, may be redeemed at any time within one year from the date of sale, by any judgment creditor, his executors, administrators, or assigns holding a judgment or decree against the defendant whose title or interest shall have been sold, which, at the time he or they offer to redeem,

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shall be a lien upon such title or interest, and which shall be junior to the judgment under which the property was sold."

It is fair to assume that this important modification of the statute was made in view of the decisions of this court already referred to, and as expressive of the legislative purpose to abrogate and effect a change in the law regulating the right of a judgment creditor to redeem from his own sale, as it had been declared in *Greene v. Doane*, *supra*, and the later cases following it. By no possible construction could it be held that a judgment or decree, which remained partially unsatisfied after a sale, not only constituted a lien upon the title or interest sold, but that it was a lien junior to the judgment under which the property had been sold.

As we have already seen, the rule is without exception, that after a sale the judgment or decree, in pursuance of which the sale was made, does not constitute a lien upon the property sold until the sale is vacated and the lien restored according to the provisions of a positive statute. It is only after the judgment debtor, or some one claiming under him, redeems, thereby vacating the sale, and terminating its effect, that the lien of the unsatisfied portion of the judgment attaches, the same as if no sale had ever taken place. That there might be no room for construction, however, the statute above set out expressly provides that the lien, which shall entitle the holder thereof to redeem, must be junior to the judgment under which the property was sold. *Simpson v. Castle*, 52 Cal. 644.

In *Porter v. Pittsburgh Steel Co.*, 122 U. S. 267 (280), the court, having under consideration the redemption law now in force in this State, held, (1.) That the sale of property on execution exhausted the lien of the judgment upon which the property was sold. (2.) That section 774 gives persons having a lien other than by judgment the right to redeem. (3.) That redemption by such persons does not have the effect to restore the lien of the decree upon which the property was

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sold, and that the statute does not give the seller the right to redeem. The decision expresses our view of the law.

An examination of the statute will make it apparent that the right to make a statutory redemption is confined to three classes of persons :

1. The owner, or part owner, his executor or administrator, under the order of the court, or his heirs or devisees, or any person claiming a legal or equitable title under him or them.

2. Any judgment creditor, his executors, administrators or assigns, whose judgment or decree shall, at the time he offers to redeem, be a lien on the property sold junior to that upon which the sale was made.

3. Any person having a lien, otherwise than by judgment, which shall have been duly recorded within one year from the date of the sale.

It is only in case of redemption by persons embraced in the first class that the sale is vacated and the real estate again subjected to the lien of the judgment and to re-sale as if no sale had been made. In no case does the statute contemplate or provide for a redemption by the judgment creditor upon whose judgment the sale was made. On the contrary, it excludes the idea at every point that one causing the sale to be made may redeem. We see no reason why such right should be given by construction, even if the court had the power or authority so to give it.

The foregoing considerations lead to a reversal of the judgment.

Judgment reversed, with costs, with directions to the court below to sustain the appellant's motion for a new trial.

Filed Dec. 13, 1888.

Johnson, Administrator, v. Culver, Administratrix.

No. 13,289.

JOHNSON, ADMINISTRATOR, v. CULVER, ADMINISTRATRIX.

SPECIAL VERDICT.—*Judgment on.*—*Practice.*—A party who deems himself entitled to judgment on a special verdict should move for judgment, and, if unsuccessful, preserve the question by an exception.

SAME.—*Separate Causes of Action.*—*Motion for Judgment on Each.*—Where the causes of action are clearly distinct, it is proper to move for judgment on each cause.

SAME.—*Discretion of Trial Court.*—It is discretionary with the trial court, after instructions have been asked and argued, to grant or refuse a request for a special verdict.

SAME.—*Instructions to Jury.*—*Practice.*—Where a special verdict is directed, instructions to the jury, except as to rules of evidence and the frame of the verdict, are dispensed with, and available error can not be predicated upon instructions relating to the general rules of law.

FRAUD.—*Contract.*—*Rescission.*—*Damages.*—*Election as to Remedy.*—A person who is induced by the fraud of another to enter into a contract with the latter, may rescind the contract *in toto*, or he may affirm the contract and sue for the damages caused by the fraud.

SAME.—*Consideration.*—*Tender.*—*Insanity.*—In ordinary cases, not complicated by the element of insanity, the plaintiff who elects to rescind must tender back the consideration received; but if he elects to sue for damages no tender is required.

SAME.—*Sale.*—*Measure of Damages.*—In an action by an administrator to recover the value of personal property obtained by the defendant under a fraudulent contract with the plaintiff's insane intestate, the measure of recovery is the loss actually sustained, *i. e.*, the value of the property less any consideration paid and retained.

SAME.—*Promissory Note.*—*Payment.*—In estimating the amount of recovery it is proper, in the absence of a showing that it has not been paid, to allow the defendant credit for a promissory note executed by him and delivered to the payee in part payment for property purchased.

SAME.—*Waiver of Right to Sue for Damages.*—To constitute a waiver of a right to sue for damages resulting from a contract procured by fraud, the party who sustains loss must act with a full knowledge of his rights and the material facts in the case, and clearly manifest his intention to abide by the contract and abandon any remedy he may have.

EVIDENCE.—*Insanity.*—*Non-Expert Witness.*—It is not necessary that the acquaintance of non-expert witnesses with a person whose mental condition is in question should be extensive or intimate; it is enough if the acquaintance is such as to enable the witness to form some opinion.

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Johnson, Administrator, v. Culver, Administratrix.

SAME.—*Conduct and Declarations of Alleged Insane Person.*—It is proper for a witness to describe the conduct and to repeat the declarations of a person whose mental capacity is the subject of investigation.

SAME.—*Value of Land.—Contract of Exchange.—Fraud.*—The value of land given in exchange for other property may be shown in a case where the contract of exchange was procured by fraud.

SAME.—*Refreshing Memory.—Written Memorandum.*—A witness may refresh his memory by reference to a written memorandum made by himself, where many items of personal property are involved.

SAME.—*Items of Account.—Entries Against Interest.*—Entries against the interest of the person by whom made are admissible for the purpose of showing items of account.

ARGUMENT OF COUNSEL.—*Reading Law to Jury.—New Trial.*—Counsel may, in civil cases, state to the jury their own views of the law, and speak in a general way of what courts and text-writers have said; but they may not read from law-books, or from written statements taken from law-books, and placed before the jury as coming from that source, and if permitted to do so, over objection, it is cause for a new trial.

From the Tippecanoe Circuit Court.

R. P. Davidson, J. C. Davidson, S. P. Baird and J. B. Sherwood, for appellant.

J. R. Coffroth, T. A. Stuart and A. L. Kumler, for appellee.

ELLIOTT, J.—The first paragraph of the appellant's claim or complaint alleges that the appellant's intestate, Sarah Rohler, owned a large amount of personal property; that she was of unsound mind at the time of her death, and that the appellee's intestate, Moses C. Culver, wrongfully appropriated, under a fraudulent contract, that personal property.

The second paragraph of the complaint alleges that Sarah Rohler was, for a long time prior to her death, the owner of one hundred and ten acres of land; that she was of unsound mind; that Moses C. Culver undertook to manage the property, and that he collected and appropriated the rents of the property to his own use.

A special verdict, embodying much evidence, and going unnecessarily into detail, was returned by the jury, but we do not deem it necessary to set forth the verdict at length, for

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it would uselessly encumber the record with irrelevant and redundant matter. We believe that the questions presented can be understood and discussed by referring to such parts of the verdict as affect each particular question, and that course we shall pursue.

The questions were presented by motions for judgment on the facts found, and this was the appropriate procedure. A party who deems himself entitled to judgment on a special verdict should move for judgment, and, if unsuccessful, preserve the question by an exception. *Austin v. Earhart*, 88 Ind. 182, *vide* opinion, p. 183; *Dixon v. Dukes*, 85 Ind. 434.

Where the causes of action are clearly distinct and different, then it is proper to move, as was done here, for judgment on each cause of action, since it is obvious that a party may be entitled to judgment on one and not on the other.

The questions arising on the special verdict are thus appropriately presented, and we will decide them in substantially the order in which counsel have discussed them.

The counsel of the appellant thus state their first position:

"The most important ruling of which we complain is the sustaining of the defendant's motion for judgment in her favor, upon the facts found in the special verdict, upon the issues formed upon so much of the allegations of the first paragraph of the claim as seeks to recover because of the appropriation by defendant's intestate of the promissory notes therein described, and the moneys arising therefrom."

That part of the special verdict which affects this particular phase of the case is, in substance, as follows:

"William Rohler died intestate, and Sarah Rohler was his widow and sole heir. He left a considerable amount of personal property, among it, the promissory notes referred to in the first paragraph of the claim or complaint.

"At the time of the death of William Rohler, Sarah Rohler was a person of unsound mind, continued to be a person of unsound mind, and of weak mind and easily influenced, until

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the day of her death, which occurred on the 1st day of January, 1884.

"At the instance of Moses C. Culver, Sarah Rohler was by this court, on the 26th day of June, 1879, appointed administratrix of the estate of William Rohler, and Culver became her surety on the bond she gave as such administratrix.

"On the 26th day of June, 1879, by a previous arrangement between Culver and one James Davidson Murphy, Sarah Rohler was brought from his, Murphy's, residence in Montgomery county to the Bramble House, a public hotel in the city of Lafayette, in the county of Tippecanoe, where these three persons, together with the wife of Murphy, met, and where letters of administration were issued to Sarah Rohler as aforesaid; and at the same time and place Sarah Rohler executed a deed of conveyance to the wife of Murphy of all the real estate owned by her, which deed had been prepared by a notary about three days before said last date, at the instance of Culver, and the deed, at the suggestion of Culver, was deposited in the vault of P. P. Culver, a son of M. C. Culver.

"J. D. Murphy was, on the 18th day of June, 1879, appointed, by a written power of attorney, a pretended agent for Sarah Rohler for the transaction of her business, at the instance of M. C. Culver."

All of the notes belonging to the estate of William Rohler were placed in the Indiana National Bank of Lafayette for collection.

In November, 1879, Culver went to the house of J. D. Murphy, where Mrs. Rohler was then living, and made a proposition to purchase from him, as the agent of Mrs. Rohler, all of the promissory notes and the money collected by the bank. At the same time he offered to pay Murphy \$100 for his own benefit if the proposition was accepted by Mrs. Rohler. Murphy agreed to submit Culver's proposition to her, but said that he would not advise "either for or against it." He did submit the proposition to her, but he did not

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tell her that Culver had agreed to pay him \$100 in case the proposition was accepted.

On the 2d day of December, 1879, Murphy, as the agent of Mrs. Rohler, entered into a written contract with Culver, wherein he, as the agent of Mrs. Rohler, agreed that the notes should be transferred to Culver. The consideration for the transfer was the agreement of Culver to pay some claims, attorney's fees and court costs in the matter of the estate of which Mrs. Rohler was the administratrix, \$1,000 in money, and in addition to convey to Mrs. Rohler forty acres of land in White county. This contract was subsequently submitted to Mrs. Rohler and approved by her.

On the 2d day of December, 1879, there was in bank to the credit of Sarah Rohler \$1,809.06, collected on the notes previously deposited, and there were, also, uncollected notes to the amount of about \$1,100.

At the time this contract was made Mrs. Rohler had no knowledge of the amount that had been collected on the notes. The total consideration agreed to be paid by Culver, including the land in White county, was \$1,569.54. Murphy was paid the \$100 promised him by Culver. The White county land was conveyed to Mrs. Rohler on the 5th day of December, 1879.

The facts found establish fraud on the part of Culver. This is quite clear, and we do not understand appellee's counsel to maintain that there was not fraud sufficient in force to vitiate the contract. To the element of fraud is added that of insanity. We have, therefore, the case of a man securing from an insane woman property of the value of \$2,909 for a consideration of \$1,569. The money in bank alone exceeded the whole consideration by more than two hundred dollars. The case is one which calls strongly for relief, and relief should be granted unless some imperative rule of law stands between it and the claimant.

The rule which the appellee invokes for protection is, that a contract can not be avoided unless the plaintiff returns, or

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offers to return, what he has received. The specific application of this rule which counsel make is, that the appellant must fail to recover the entire value of the notes because the White county land has not been re-conveyed to the appellee.

The general rule in many cases unquestionably is that stated by the appellee's counsel, but we regard it as not applicable to this case. We understand the law to be, that a defrauded plaintiff may either rescind the contract *in toto*, or he may affirm the contract and sue for the damages caused by the defendant's fraud. *Home Ins. Co. v. Howard*, 111 Ind. 544.

In ordinary cases, that is, cases not complicated by the element of insanity, the plaintiff who elects to rescind must tender back the consideration received; but where he elects to sue for damages no tender is required. We do not, however, deem it necessary to inquire or decide what the rule is where a rescission is demanded, and both fraud and insanity are present, for we think this is not a case for rescission, but we think, as we have said, that it is an action for damages. We regard the claim not as a demand for rescission, nor as a demand for the recovery of specific property, but as a demand for the recovery of the value of personal property obtained under a contract with an insane person procured by fraud.

The first inquiry, as the case is presented by the record, is, therefore, what damages shall be awarded in such a case to the representative of the defrauded person? He seeks compensation, and to compensation he is entitled. Full compensation is his due, but nothing more. He can not make the purchaser pay more than the loss sustained. We can not, therefore, concur with the appellant's counsel that their client was entitled to recover the value of the notes and money, irrespective of the compensation actually paid Mrs. Rohler, but we think that he is entitled to recover the value of the notes less the consideration paid to Mrs. Rohler and retained by her.

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As given in the brief of counsel, the value of the notes and money aggregates \$2,909.06, and the consideration paid was \$1,569.54. The loss actually sustained is the difference between these two sums (assuming that they are correctly stated), which is \$1,339.52, and as this sum represents the loss actually sustained, it should be the measure of recovery. As the seller received \$1,569.54, all she lost was the value of the notes in excess of that sum, and this furnishes the measure of damages for this item of the appellee's claim. Our conclusion upon the immediate question before us is, that the appellee was entitled to judgment for the sum representing the difference in value between the value of the notes and money obtained under the fraudulent contract and the sum paid to Mrs. Rohler and by her retained.

Before leaving this branch of the case we desire to again direct attention to the character of the claim or action, because we do not intend that the case shall be confused with cases for rescission or for the recovery of specific property. We mean to limit our decision to the case which the record makes, and that is to a claim for damages, pure and simple. To such a case we do limit it. In this connection it is proper to speak of the case of *Campbell v. Kuhn*, 45 Mich. 513, relied on by the appellee. That case is not in point. That action was brought to recover the balance of a deposit which an insane person, previous to her insanity, had placed in the hands of the defendant. The latter claimed that he had paid it by a conveyance executed to her after she had become insane, and it was held that the action would not lie without tendering a re-conveyance.

In two essential particulars that case is unlike the present. Here there was an actual fraud practiced upon an insane person, while in that case there was no fraud; and here, too, the action is to recover damages caused by the fraud, and not to recover back money paid for property. The controlling element of difference, in our opinion, is that here the representative of the insane person does not demand back any

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property, but demands compensation for loss caused by the fraud of the defendant's intestate. Our view of the right of recovery and of the measure of damages is sustained by the case of *Burnham v. Mitchell*, 34 Wis. 117. It is true that the question was not presented in that case precisely as it is here, but the principle there declared is essentially the same as that which we here adopt.

The retention of property by a party who has suffered loss from the fraud of another does not preclude the loser from maintaining an action for damages, nor does even an express waiver of the fraud and explicit ratification of the contract have the effect to deprive the party of his action, unless, indeed, the ratification is of such a character as to imply a release from the consequences of the fraud.

In the case of *St. John v. Hendrickson*, 81 Ind. 350, it was said: "It is undoubtedly the law, that there may be a waiver of a right to recover damages for loss resulting from false and fraudulent representations by an express affirmance. It is essential to such a waiver, that the party should possess full knowledge of the fraud practiced upon him; that he should intend to confirm the contract and abandon all right to recover for the loss resulting from the fraud."

Mr. Bigelow does, indeed, disapprove that case, because, as he impliedly, at least, maintains, even an express abandonment of the claim for damages will not preclude the party from maintaining an action. Law of Fraud, 69, n.

We think that the learned author does not fully appreciate the fact which clearly appears in the case criticised, that the plaintiff, although he once accepted back from the defendants the money which he alleged was fraudulently obtained from him, subsequently, and with full knowledge of all the facts, returned the money and affirmed the original contract. But if Mr. Bigelow is right, our error was in not carrying the rule far enough, and, of course, we ought now to decide, if that learned author is right, that in no event can there be an affirmance of the contract and an abandonment of the right

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of action, and this would operate more strongly against the appellee than the rule we did and do approve. The rule we asserted is substantially that given by Judge Cooley, who says: "The fraud may also be waived by an express affirmance of the contract. Where an affirmance is relied upon it should appear that the party having a right to complain of the fraud had freely, and with a full knowledge of his rights, in some form, clearly manifested his intention to abide by the contract, and waive any remedy he might have had for the deception." Cooley Torts, 505. Very many cases are cited by Judge Cooley in support of the text, and they do, as we believe, fully sustain it.

The case of *Parker v. Marquis*, 64 Mo. 38, decides that "Where a party has been defrauded by another in making an executory contract, a subsequent performance of it on his part, even with the knowledge acquired subsequently to the making, and previous to the performance, will not bar him of any remedy for the recovery of damages."

This is the rule, as we understand the authorities to declare it, but we do not understand that it extends to a case where the right of action has been released or freely and fully abandoned. *Whitney v. Allaire*, 4 Denio, 554; *Payne v. Whale*, 7 East, 274; *Nauman v. Oberle*, 90 Mo. 666; *Grabenheimer v. Blum*, 63 Texas, 369.

We say here, as we said in *St. John v. Hendrickson*, *supra*, that "We fully recognize and approve the rule that a party may retain what he received, stand to his bargain, and recover for the loss caused him by the fraud. We do not mean to run counter to this rule. We neither hold nor mean to hold, that affirmance by retention of the thing bargained for cuts off an action for damages. We do hold that, where a party with full knowledge of all the material facts does an act which indicates his intention to stand to the contract and waive all right of action for the fraud, he can not maintain an action for the original wrong practiced upon him." *Mc-*

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Queen v. State Bank, 2 Ind. 413; *Campbell v. Fleming*, 1 Ad. & E. 40.

The case before us falls far within the rule, for here there was neither knowledge of the facts, nor abandonment of the right to compensation for the loss occasioned by the fraud. Excluding entirely the element of mental unsoundness, the appellant is entitled to compensation for the loss caused his intestate by Culver's fraud.

It appears from the special verdict that Culver obtained personal property, grain, domestic animals and the like, from the appellant's intestate through the medium of her agent, Murphy, and that, although he paid part of the value of those articles, he did not pay their full value. The special verdict contains these facts relevant to the question we are now discussing:

"That in the purchases of the corn, wheat and oats, being the crops raised on the lands of said Sarah Rohler, and in the purchase of the other personal property, other than the promissory notes, which said purchases are above set out, and which were made by Culver of J. D. Murphy, as the pretended agent of Sarah Rohler, Culver acted in collusion with J. D. Murphy, with the fraudulent intent to cheat and defraud Sarah Rohler.

"That all of the purchases made by Culver of Sarah Rohler in person were, and are, fraudulent.

"That from the time of her marriage to William Rohler, in 1855, until January, 1879, Sarah Rohler resided in the immediate neighborhood of Culver, and was by him well known, and that during that time she was of weak mind, which was well known to Culver."

It is shown by what has been already said that Culver became liable for the reasonable value of the property obtained by fraud from Mrs. Rohler, and that the appellant was entitled to recover, as damages, the difference between that value and the consideration paid her by Culver. As we understand counsel, and gather from the record, an allowance

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was made for this amount in the judgment of the court, but that the amount due the appellant on account of the appropriation of the money and promissory notes of which we have spoken, was not included in the judgment, as it should have been.

We agree with the appellee's counsel that the appellant would not be entitled to recover for any of the personal property if it had been appropriated by his intestate without any contract between him and Mrs. Rohler before it came into her custody and control. But she did have the control and custody of the property, and Culver did obtain it under a contract with her, and the estate of her husband was fully settled before her death. The sole ownership of the property and the right of action were, therefore, vested in her, and her representative succeeded to that right of action. The case before us is not at all like that of *Douglass v. McCarer*, 80 Ind. 91, but is, in all of its principal features, a case of an entirely different class.

The appellant insists that the trial court erroneously allowed the appellee a credit of \$300 by treating a promissory note executed to her by Culver in part payment for some of the personal property obtained from her as a payment for the property. The finding on this point is this: "That Culver paid therefor \$140.75 cash and gave his note for \$300, and in no other way was the property paid for, and there is no evidence that any part of the note for \$300 was ever paid."

We can not hold that the trial court erred in allowing the credit. As the note went into the possession of Mrs. Rohler and has been retained by her and her representatives for a very long time, the presumption is that it was paid or was accepted as payment. No account whatever is given of the disposition made of the note, and we do not think that upon the facts found it can be declared, as a conclusion of law, that it has not been paid. The note is traced to the possession of the payee, and not having been produced or accounted for, it can not be adjudged that it has not been paid.

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Many of the cross-errors assigned by the appellee are disposed of in discussing the questions presented by the appellant's assignment of errors, and we do not deem it necessary to further discuss those questions. Others it becomes necessary for us to examine, and to that work we now proceed.

The record in the action brought to contest the will of Mrs. Rohler was properly admitted in evidence for the purpose to which its effect was limited by the instructions of the court. It was competent to show by the record that the will was judicially adjudged invalid, and to this the effect of the evidence was restricted by the court.

There was no error in permitting the opinions of non-expert witnesses to go to the jury, for the witnesses disclosed to the jury the facts on which the opinions were based. It is not necessary that the acquaintance of witnesses with the person whose mental condition is in question should be extensive or intimate; it is enough if the acquaintance is such as to enable the witnesses to form some opinion. The value of the opinion will, of course, depend upon the facts on which it rests. *Colee v. State*, 75 Ind. 511; *Sage v. State*, 91 Ind. 141; *Goodwin v. State*, 96 Ind. 550; *City of Terre Haute v. Hudnut*, 112 Ind. 542, op. p. 550.

It is entirely proper for a witness to describe the conduct and to repeat the declarations of the person whose mental capacity is the subject of investigation. The declarations are not themselves evidence against the adverse party, except in so far as they constitute a part of the facts upon which the opinion of the witness is founded. Beyond that they have no effect.

The evidence concerning the White county land was competent. It is proper to prove the value of land given in exchange for other property in a case like this, where the contract of exchange was procured by fraud. What has been said in discussing the measure of recovery establishes

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the competency of the evidence respecting the land in White county.

A witness may refresh his memory by reference to a written memorandum made by himself in a case where many items of personal property are involved. He can not, to be sure, testify entirely from the writing, for he must have a knowledge and recollection independent of the memorandum, but for the purpose of assisting his memory and giving accuracy to his statements he may refer to what he has written.

Entries against the interest of the person by whom made—"self-disserving entries," as Dr. Wharton calls them—especially when made in the usual course of business, and in the books usually kept in that business, are admissible for the purpose of showing the items of account. It is obvious that if entries were not admissible long and complicated accounts could never be exhibited to a jury, for human memory is not capable of retaining details of that character. The trial court did right in admitting the books of the bank in connection with Mr. Brockenbrough's testimony.

It was not an abuse of discretion on the part of the trial court to direct a special verdict after instructions had been asked and argued. It was discretionary with the court at that stage of the proceedings to refuse or to grant the request for a special verdict.

The record thus describes the conduct of one of the appellant's counsel in argument, of which conduct complaint is here made, and upon which is founded one of the causes assigned by the appellee for a new trial:

"In the final argument by the plaintiff's counsel, he took from his pocket a written memorandum containing extracts from text-writers and from adjudicated cases, which extracts are hereinafter set out, and read to the jury therefrom, in consecutive order, a part of each of said extracts, and at the same time (with said memorandum in his hand, and as if reading therefrom) stated to the jury the substance of the balance of each of said extracts not so literally read to them,

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giving the author and the section or page of each of said extracts. Which said extracts so partly read and partly stated in substance to the jury, read in these words, to wit:

“ ‘Taylor on Evidence says: Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These gentlemen are usually required to speak not to facts, but to opinions; and where this is the case it is often quite surprising to see with what facility and to what extent their views can be made to correspond with the wishes or the interests of the parties who call them. (Section 58.)’

“ ‘And they come with biased minds to support the cause on which they are embarked. Little weight will, in general, be attached to the evidence they give unless based on obviously sensible reasonings. (Section 1877.)’

“ ‘Best on Evidence says: Testimony is daily received in our courts as scientific evidence to which it is almost profanation to apply the term, as being revolting to common sense, and inconsistent with the commonest honesty on the part of those by whom it is given. (Section 514.)’

“ ‘The Supreme Court of the United States, in the case of *Winans v. New York and Erie R. R. Co.*, 21 Howard, 88, says: Experience has shown that expert testimony can be obtained to any amount, and that many days and weeks are wasted wearying court and juries without elucidating questions involved.’

“ ‘And the Supreme Court of Michigan, in 29 Michigan, 1, Judge CAMPBELL says that expert testimony has not been such as to impress them with the conviction that the scope of such proofs should be extended.’

“And thereupon the defendant objected to this action of counsel in reading from said memorandum and in stating what law-writers and authors had said and decided upon this question, and asked the court to instruct the jury that this action of counsel was improper, and should not be considered by them, and that the jury should not be affected by what had been read from said memorandum. But the court

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declined to make any order, and counsel on his own motion ceased to read from the manuscript, but made a general statement to the jury over the defendant's objection that what he had read was the general opinion of courts and law-writers on the subject of experts and expert testimony, and to the action of the court in refusing to stop counsel from reading from said memorandum and in refusing to instruct the jury as requested, and to the action of counsel, defendant then and there excepted."

The matter thus brought before the jury bore, it is important to keep in mind, directly and strongly upon the credibility and value of the testimony of the witnesses. It did not relate to general principles of law, but to the testimony of the witnesses who came before the jury. Counsel assumed to give the jury the rules for weighing testimony, and this was a subject upon which it was proper, notwithstanding the fact that a special verdict was directed, for the court to give the jury instructions. The matter was, therefore, material and tended strongly to influence the jury as to their conclusions upon the evidence.

The rule which is established upon principle and authority is, that counsel should not, in civil actions, be permitted to read the law from books to the jury. The law should come from the court in all civil cases. If any other rule is adopted, then confusion must almost certainly result, for the opinions of text-writers conflict and the decisions of the courts clash. The just and effective administration of justice requires that the jury should take the law from the court and not from books or decisions selected by counsel. The cases are generally in harmony upon this point, although there is some conflict among them. *Porter v. Choen*, 60 Ind. 338; *City of Evansville v. Wilter*, 86 Ind. 414, see p. 418; *Cory v. Silcox*, 6 Ind. 39; *People v. Anderson*, 44 Cal. 65; *Baker v. City of Madison*, 62 Wis. 137; *Sullivan v. Royer*, 72 Cal. 248; *Ordway v. Haynes*, 50 N. H. 159; *City of*

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Chicago v. McGiven, 78 Ill. 347; *Gilbertson v. Miller, etc., Co.*, 5 Pac. Rep. 699.

It is the province of the court to declare the law to the jury, and it is the duty of the jurors to take the law from the court.

It is true that in this instance counsel did not directly read from books actually before him, but he read from written statements taken from the books, and these statements were placed before the jury as coming from that source. This was to all intents and purposes the same thing as reading directly from the books. The jury were informed that the extracts were taken from books which contained the law and the extracts were read as expressing the law. What counsel can not directly do they can not do by indirection. The rule against reading the law from books can not be evaded by copying from the books and reading as the statements of the law the extracts copied. Appellant's counsel violated a salutary rule of law and invaded the rights of the appellee, giving her just cause of complaint. By veiling his purpose he did not conceal it, and the result is that the cause for a new trial based on the misconduct in argument is well assigned. The trial court erred in not checking counsel and in not explicitly instructing the jury to disregard what was read to them. *Nelson v. Welch*, 115 Ind. 270.

We do not, we add, to prevent possible misconception, intend to be understood as deciding that counsel may not state their own views of the law, or that they may not, in a general way, speak of what courts or text-writers have said, but we do intend to decide that it is not proper for them to read to the jury extracts from books as the law of the case. There is, every one must see, a wide difference between reading from books and making general statements of the law. An extract taken from a book very often has a weight and influence with men that it is not at all entitled to receive, for it is commonly supposed that what is found in a law book is a correct

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and indisputable statement of the law, whereas in many instances it is far from being correct or accurate.

The court was not bound to give any instructions as to the general rules of law governing the case, for, where a special verdict is directed, the law must be applied by the court when the verdict presents the facts to it. *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582.

We need not, therefore, inquire or decide whether the instructions upon the general rules of law were, or were not, correct, for the special verdict places the facts upon the record, and upon them the judgment must be pronounced so that the instructions of the character specified are not of controlling importance. A special verdict dispenses with instructions except as to rules of evidence and the frame of the verdict.

We have not discussed all, by any means, of the questions presented by the one hundred and five causes assigned for a new trial in appellee's motion, but we have decided all that we think likely to arise on another trial, and this we conceive is all that we are required to do. We share in the regret of appellant's counsel that the cause must go back for a new trial, but the error in permitting the law to be read in argument to the jury is a material one, is strongly pressed, and necessarily leads to a judgment directing a new trial.

Judgment reversed, at the costs of the appellant, with instructions to sustain the appellee's motion for a new trial.

Filed Dec. 13, 1888.

Armacost, Administrator, v. Lindley, Administrator.

No. 13,259.

ARMACOST, ADMINISTRATOR, v. LINDLEY, ADMINISTRATOR.

CONVERSION.—Action.—Demand.—Where one appropriates the money or property of another, without the knowledge or consent of the latter, the appropriation is wrongful, and an action may be maintained for its recovery without averring or proving a demand.

DECEDENTS' ESTATES.—Claims.—Demand.—Claims against an estate, even though they be such as ordinarily require a demand before suit, may be filed and prosecuted without making a demand.

PLEADING.—Complaint.—Theory.—Judgment.—A complaint must proceed upon some single, definite theory, and a recovery will be upheld only when the evidence and the facts found support the case made by the complaint.

HUSBAND AND WIFE.—Conversion of Wife's Property.—Decedents' Estates.—Pleading.—Theory of Complaint.—Judgment.—Where a complaint against an administrator charges that the decedent, without the plaintiff's consent or knowledge, wrongfully appropriated to his own use the proceeds of a sale of land belonging to the plaintiff, who was the decedent's wife, it will not support a judgment if the proof shows that possession was taken with the plaintiff's consent, but with no intention on her part to divest herself of title, although upon a complaint proceeding on a proper theory she may recover.

From the Howard Circuit Court.

J. C. Blacklidge, W. E. Blacklidge and B. C. Moon, for appellant.

C. N. Pollard, J. W. Cooper and B. F. Harness, for appellee.

MITCHELL, J.—This action was commenced by Mary Harmon against the estate of Charles Harmon, deceased. The plaintiff died pending the action, and, on motion, Tence Lindley, administrator of her estate, was substituted as plaintiff.

The material averments in the complaint are, that on the 21st day of October, 1882, Mary Harmon and Charles Harmon were husband and wife, the former being the owner in her own right of twenty acres of land in Howard county, the latter at the same time owning an undivided one-fourth

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of an adjoining twenty-acre tract; on the date above mentioned, Mrs. Harmon's twenty acres and the undivided interest owned by her husband, estimated at five acres, were sold and conveyed to Daily S. Yager for \$1,625, the whole being estimated at the rate of \$65 an acre; \$500 of the purchase-money was paid down, and the plaintiff charged that her husband, without her knowledge and consent, took the promissory notes of the purchaser, payable to himself, for the entire amount of the unpaid purchase-price. It was alleged that the plaintiff did not know that the notes were made payable to Charles Harmon until after his death; that Armocost, as administrator, had taken possession of the notes, collected part of the money and paid it over to the clerk of the Howard Circuit Court, who held it subject to the order of the court. Prayer that the administrator and clerk be ordered to pay over to the plaintiff four-fifths of the proceeds of the notes collected and to be collected.

In respect to the propriety of the ruling of the court in overruling the demurrer to the complaint, it is only necessary to say, that, since the demurrer admitted that four-fifths of the consideration of the notes was the purchase-price of the separate property of Mrs. Harmon, and that her husband took notes, which included the purchase-money belonging to his wife, payable to himself, without her knowledge or consent, this made the complaint sufficient without a demand. Where one person appropriates the money or property of another, without the knowledge or consent of the owner, the appropriation is wrongful, and an action may be maintained for its recovery without averring or proving a demand. *Terrell v. Butterfield*, 92 Ind. 1, and cases cited; *Louisville, etc., R. W. Co. v. Balch*, 105 Ind. 93, and cases cited.

While the action was commenced by filing an ordinary complaint against the administrator and clerk, the parties, as was their right, seem to have treated the case as a claim against an estate. *Stapp v. Messeke*, 94 Ind. 423. Claims against an estate, even though they be such as ordinarily require a

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demand before suit brought, may be filed and prosecuted to judgment without making a demand. *Walker v. Heller*, 104 Ind. 327, and cases cited.

Upon request the court made a special finding of the facts. After finding the relation of the parties, and the ownership and sale of the lands as alleged in the complaint, the court found "that the notes for the deferred payments of both said tracts of land were made payable to said Charles Harmon, the husband of said Mary Harmon, with the knowledge of said Mary Harmon, who was present when said notes were drawn up, and, at the suggestion of Charles Harmon, consented that the notes be drawn payable to him."

The court found further "that there was no agreement between said Charles and Mary Harmon that the said notes and the proceeds thereof should belong to or be the separate property of said Charles Harmon, or for his use and benefit in any manner."

Having found the other facts substantially as alleged in the complaint, the court stated conclusions of law, and gave judgment, or made an order according to the prayer of the complaint.

The appellants now insist that the conclusions of law, and the order of the court made in pursuance thereof, can not be upheld, because the facts specially found, if they make a case upon which a recovery could be sustained under any circumstances, make one entirely outside of the material issues presented by the complaint.

There seems to be no way of escape from this proposition. It has often been decided that every pleading must proceed upon some single, definite theory, and that a party must stand or fall upon the theory of his case as he presents it in his pleadings. A recovery will be upheld only when the evidence and the facts found support the case made by the complaint. *Bremmerman v. Jennings*, 101 Ind. 253; *Brown v. Will*, 103 Ind. 71; *Thomas v. Dale*, 86 Ind. 435; *Hasselman v. Carroll*, 102 Ind. 153; *Louisville, etc., R. W. Co. v. Godman*, 104

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Ind. 490; *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Cleveland, etc., R. W. Co. v. Wynant*, 100 Ind. 160; *Town of Cicero v. Clifford*, 53 Ind. 191; *Boardman v. Griffin*, 52 Ind. 101.

A party who bases his right of recovery upon the breach of an express special contract can not recover upon proof of a breach of an implied contract, or the failure to perform a legal duty by the defendant, nor can there be a recovery where the action is upon an implied contract, if the evidence discloses the breach of a special contract. *Bartlett v. Pittsburgh, etc., R. W. Co.*, 94 Ind. 281, and cases cited.

So, where the complaint counts upon a conversion of property by the defendant, there can be no recovery if the facts show that the property sued for was taken with the plaintiff's consent, even though there may have been an implied promise to pay for it.

The complaint in the present case, in effect, charges that the plaintiff's husband wrongfully took and appropriated to his own use the proceeds of the sale of the land without her knowledge and consent. The special findings show that the notes were taken payable to the husband with the plaintiff's consent. While the plaintiff may have been entitled to recover upon some theory, she was not so entitled upon the theory of her complaint. *Bixel v. Bixel*, 107 Ind. 534; *Leary v. Moran*, 106 Ind. 560.

A husband who takes possession of and appropriates the separate property of his wife, may be held liable when the appropriation is wrongful, without her knowledge or consent, or when he takes it with her consent under an agreement to hold it for her use, or when the circumstances are such as raise an implied obligation or equitable duty on his part to account to her for it. *Bristor v. Bristor*, 93 Ind. 281; *Wilkins v. Miller*, 9 Ind. 100; *Dayton v. Fisher*, 34 Ind. 356; *Garner v. Graves*, 54 Ind. 188.

Where, as in the present case, it appears that a husband, at his own suggestion or request, obtained the title to and pos-

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session of his wife's separate property, which the statute provides shall remain her own, even though possession be obtained with her consent, unless the facts and circumstances show an agreement or intention on the part of the wife that her husband should receive it as a gift, the law will presume that he took as her agent or trustee. *Hileman v. Hileman*, 85 Ind. 1; *Wales v. Newbould*, 9 Mich. 45; *Meltinger v. Bausman*, 45 Pa. St. 522; *McNally v. Weld*, 30 Minn. 209.

What presumption would be indulged in case a wife voluntarily, without any suggestion or request from her husband, personally delivered money to him, or invested him with the title to her property, we do not now decide. The authorities are not fully in accord on the subject. *Jacobs v. Hesler*, 113 Mass. 157; *Clark v. Rosenkrans*, 31 N. J. Eq. 665; *Kahn v. Wood*, 82 Ill. 219.

Transactions between husband and wife are presumably influenced by the peculiar relation which exists between them, and where a husband obtains possession of the separate money or property of his wife, it must appear from all the circumstances that the wife intended to make a gift of it to him.

The complaint in the present case proceeded distinctly upon the theory that the estate of Charles Harmon was liable because the decedent had taken possession of part of the proceeds of the sale of his wife's property without her knowledge or consent, and that she remained in ignorance that her property had been so taken until after her husband's death. The plaintiff might have recovered, in case the proof justified a recovery, upon an ordinary common count for money, promissory notes, etc., had and received by the decedent in his lifetime to the plaintiff's use. She saw fit, however, to declare specially, making the wrongful appropriation of her property without her knowledge or consent the *gravamen* of the complaint. Having declared specially, a recovery could only be had by proving the sub-

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stance of the issue as tendered. It was the duty of the administrator to prepare to meet the case made by the complaint. He was not bound to anticipate that the plaintiff might recover on issues not tendered. Within the established rule, the facts specially found did not justify a judgment in favor of the plaintiff on the case made by the complaint. The justice of the case requires that there should be a new trial.

The judgment is reversed, with costs, with instructions to the court below to sustain the defendant's motion for a new trial.

Filed Dec. 14, 1888.

No. 13,806.

THE STATE, EX REL. MICHENER, ATTORNEY GENERAL, *v.*
HARRISON ET AL.

OFFICE AND OFFICER.—*Benevolent Institutions.*—*President of Boards of Trustees.*—*Compensation.*—*Statute Construed.*—The acts of 1879 and 1883 (Acts of 1879, p. 4; Acts of 1883, p. 15), providing for the management of the State benevolent institutions, contemplate that the president of the boards of trustees shall receive the compensation provided for the president and also compensation as trustee of each of the institutions, as he is not only president of the several boards, but is also expressly made a trustee for each institution.

SAME.—*Construction of Statute by Practice and Usage.*—*Acquiescence.*—Where a doubtful statute, providing for the compensation of a public official, has received a construction by the Legislature and by the practice and usage of the administrative department of the government, in which construction the officer concerned has acquiesced, he is bound by the compensation thereby fixed.

SAME.—*Holding Two Lucrative Offices.*—*Constitutional Inhibition.*—The fact

116	300
119	409
116	300
196	461
116	300
126	571
116	300
141	189
116	300
144	237
116	300
180	611
116	300
168	189
168	576
116	300
169	239

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that the president of the boards of trustees of the benevolent institutions is entitled to compensation for his services as president of the boards and also to compensation for his services as trustee for the several institutions, does not make him the holder of two lucrative offices, as prohibited by the Constitution.

STATUTE.—Construction.—Legislative Intention.—To ascertain the intention of the Legislature in the enactment of a statute, all the sections of the statute and the several acts of the Legislature upon the same subject must be construed together; and in the construction of a doubtful statute, other statutes upon the same subject may be considered, although no longer in force.

SAME.—Construction by Practice and Usage.—For a consideration of cases relating to the construction of ambiguous statutes by the practice and usage of the departments of government, of public officers and of the people, see opinion.

From the Boone Circuit Court.

L. T. Michener, Attorney General, for appellant.

C. S. Wesner, *O. D. Wesner*, *R. W. Harrison* and *B. S. Higgins*, for appellees.

ZOLLARS, J.—In 1883 Thomas H. Harrison was elected president of the boards of trustees for the Hospital for the Insane, the Asylum for the Blind, and the Institution for the Education of the Deaf and Dumb, and gave bond as such, with his co-appellees herein as sureties.

From the time of his election and qualification until this action was commenced, in March, 1887, he drew from the state treasury as salary and compensation the sum of \$1,600 per annum.

The attorney general claims that he was entitled to but \$900 per annum, and instituted this action, in the name of the State, upon his bond, to recover back from him and his sureties the amount drawn in excess of \$900 per annum.

By the first section of the act of 1879 it was provided that the Governor, with the consent of the Senate, should appoint two trustees for each of the benevolent institutions above named, and should, also, with like consent, appoint a president of the boards of trustees of said institutions.

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It further provided that the president and the two trustees of each of said institutions should constitute the board of trustees for the government thereof. Acts of 1879, p. 4; R. S. 1881, section 2768.

The third section of that act provides that the boards shall organize by the selection of one member as treasurer and one as secretary, and that the president of the boards shall be the president of each board respectively. R. S. 1881, section 2770.

The fifth section provides that the president and trustees of each of said institutions shall be, and constitute, a board for the management of the business and affairs thereof, with power to make all proper rules, regulations and by-laws for its government; that they shall have a regular meeting at or about the close of each month, and shall meet at least one other time during each month for the purpose of informal consultation or the transaction of current and incidental business.

Other sections of the act clothe the several boards with authority to appoint superintendents, and to supervise the appointments of all other subordinates. They must receive and pass upon reports from the superintendents, audit and allow bills, supervise the improvements and repairs of the buildings and grounds, furnish supplies for the several institutions, etc., etc. In short, the whole care, maintenance, preservation, management and supervision of the several institutions is lodged with the board of trustees of each respectively. Each board of trustees is responsible for the management of the institution over which it is placed.

The act of 1883 (Acts of 1883, p. 15), which superseded and repealed the first and second sections of the act of 1879, does not affect the duties and responsibilities of the president and the several boards of trustees, but is more emphatic in making the president of the several boards an essential member of each.

The first section of that act is as follows: "Be it enacted

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* * * That the government and management of the Indiana Hospital for the Insane, of the Asylum for the Blind and of the Institution for the Education of the Deaf and Dumb shall be and is hereby vested in three several boards of trustees, consisting of two trustees for each of said institutions and one president for the three several boards, which president shall be the presiding officer and third trustee of each of said boards. * * * The said boards shall, on their organization and every two years thereafter, select one of their number as secretary and one as treasurer thereof."

Under these acts there can be no complete board of trustees for either of the institutions without the president. He must meet with each of the boards as a member of it. He must do the work of a member of each board. He is responsible with each board for the management of the institution under its supervision.

Being a member of all the boards, with general supervisory powers and duties, he must perform those duties and be responsible for the management of all the institutions. And thus it is, that the president of the boards must assume the responsibility and perform the duties imposed upon him as the officer having general supervisory power, and must, also, perform as much service as one of the trustees in each of the several boards, and assume the responsibility of such a trustee.

Counsel for appellee argue that by reason of these multiplied duties, and the responsibilities resting upon the president, he ought to receive the same compensation as one of the trustees of each of the boards, and, also, compensation for the additional duties and responsibilities imposed and resting upon him as president of all the boards. That argument, while it might more properly be addressed to the Legislature, and can not have weight where there is no ambiguity in the statutes, is yet entitled to some consideration where, as here, there is doubt as to the proper construction

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to be given to the statutes bearing upon the question of compensation.

The act of 1879, which provided for the appointment of boards of trustees for the benevolent institutions, and for the "more efficient management and uniform government of the same," contained a section providing for compensation, which is still in force, and is as follows :

"The president of the boards shall receive, as compensation for his services, a salary, payable quarterly, at the rate of nine hundred dollars per annum ; and the trustees of the insane asylum shall, in like manner, be paid salaries at the rate of six hundred dollars to each ; and the trustees of the institution for the education of the deaf and dumb shall, in like manner, be paid salaries at the rate of four hundred dollars to each ; and the trustees of the asylum for the blind shall, in like manner, be paid salaries at the rate of three hundred dollars to each," etc. R. S. 1881, section 2778.

A cardinal rule in the construction of a statute, or a particular section of a statute, is to ascertain the intention of the law-makers in its enactment. And in order to determine what that intention may have been, all of the different sections of the statute, and the several acts of the Legislature upon the same subject, must be construed together. It is also well settled, that, for the purpose of arriving at a proper construction of a doubtful statute, other statutes upon the same subject may be considered, although they may be no longer in force. *City of Evansville v. Summers*, 108 Ind. 189, and cases there cited ; *Western U. T. Co. v. Steele*, 108 Ind. 163 ; *Endlich Interp. Stat.*, section 366.

It is manifest that those rules should be applied here, and that the section last above quoted should be construed in connection with the several sections of the act of which it forms a part, and in connection with the section of the act of 1883, above set out. It will be proper, also, to keep in mind the first two sections of the act of 1879, which were repealed by the act of 1883.

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Thus considering the statutes together, the proper construction of section 2778, *supra*, becomes a question not clear of doubt, and opens a field for discussion.

As already stated, the attorney general contends that \$900 per annum is provided as a full compensation for all services rendered by the president of the boards of trustees, whether exercising his general supervisory powers, or acting with each separate board as a member of it.

That contention can not be said to be without reason. It may plausibly be argued that, under the act of 1879, of which section 2778, *supra*, forms a part, the president of the boards of trustees becomes a member of each board by virtue of his position as president only, and that while acting with each separate board he is performing his duties as president, and that the act of 1883 does not materially change his relations to the several boards; and that, by reason of these considerations, the compensation to him as president was intended to cover all services in any way to be performed by him.

On the other hand, counsel for appellees contend that, under the act of 1883, *supra*, \$900 per annum is provided as compensation for the services and responsibilities imposed and resting upon the president of the several boards in the discharge of his general supervisory powers; that he is made a trustee of each of the several boards, and is, therefore, entitled to the compensation provided for a trustee of each of the boards with which he acts, and of which he is a member. That contention, again, is not without reason.

The act of 1879 very clearly made the president a member of the several boards, and, as already stated, without him neither one of the boards could be complete. The duties and responsibilities of a member of each of the several boards were imposed upon and vested in him. For all practical purposes, at least, he was one of the trustees of each of the several boards.

The act of 1883, in more specific terms, declares that the

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president for the several boards "shall be the presiding officer and third trustee of each of said boards." The title under which he is to be elected is the "president of the boards," but the act seems to make him a trustee in each of the several boards just as clearly and emphatically as it makes him the president. It lodges and vests the government and management of the benevolent institutions in the several boards of trustees, and provides for the election of three boards. Two of the members of each board are to be elected with the title of trustees. Another person is to be elected with the title of president of the boards, but the same act which clothes him with that title just as emphatically declares that he shall be the "third trustee of each of said boards."

There is no more authority for saying that he is the president of the boards, and not a trustee of each, than for saying that he is a trustee of each board, and not the president of all of them. The act which makes him the president of the three boards just as clearly makes him a trustee of each. He performs the duties of the president of all the boards, and of a trustee of each. It is because of this that counsel for appellees claim that he is entitled to the \$900 fixed as the compensation of the president, and also to the amounts fixed as the compensation of a trustee in each of the boards. The total of these several amounts, added to the \$900, is \$2,200.

As we have said, there is room here for argument and for doubt. After a careful examination of the several statutes, and the question in issue, we have concluded that in this case the doubt should be solved and the question settled by a resort to the construction given to the statutes by the Legislature, the executive department, which, under our Constitution, includes the administrative department, by the practice and usage of that department, and the acquiescence of Harrison and his predecessor in that construction, practice and usage.

A construction put upon an act by the Legislature itself,

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by means of a provision embodied in the same act, that it shall, or shall not, be construed in a certain designated manner, is binding on the courts, although the latter, without such a direction, would have understood the language to mean something different. And it has been held that a statute declaratory of a former one has the same effect upon the construction of such former act, in the absence of intervening rights, as if the declaratory act had been embodied in the original act at the time of its passage. Endlich Interp. Stat., section 365. See, also, *Smith v. State*, 28 Ind. 321; *Jones v. Surprise*, 4 New Eng. Rep. 292 (294).

And so, a construction given to an act by the Legislature, by a subsequent act or otherwise, either expressly or impliedly, is of weight in all cases of doubt as to the proper construction to be given to such act. That is especially so, if the construction thus given is at the same session with the passage of the act. Sedgwick Constr. Stat. and Const. Law, p. 214.

In speaking of the meaning to be given to certain words in a statute, the Supreme Court of Pennsylvania, in the case of *Philadelphia, etc., R. R. Co. v. Catawissa R. R. Co.*, 53 Pa. St. 20 (60-1), said: "And if a contemporaneous construction of the same words by the Legislature itself can be discovered, it is very high evidence of the sense in which the words are to be received; for *contemporanea expositio est fortissima in lege*." See, also, Sedgwick Constr. Stat., p. 552; *People v. Supervisors*, 100 Ill. 495; *Hahn v. United States*, 107 U. S. 402; *Stuart v. Laird*, 1 Cranch, 299.

And so, the practical construction given to a statute by the public officers of the State, and acted upon by those interested, and by the people, is to be considered in cases of doubt. In some cases it has been held to be conclusive. Sedgwick Constr. Stat., p. 227.

In the case of *Blake v. Nat'l Banks*, 23 Wall. 307 (321), the Supreme Court of the United States used this language: "The ambiguous terms of the statute prevent the possibility

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of a satisfactory solution of the question presented. We are inclined to adopt the construction practically placed upon it by the administrative department of the government." See, also, *Solomon v. Commissioners, etc.*, 41 Ga. 157; Endlich *Interp. Stat.*, section 357; Bishop *Written Laws*, section 104; *Bailey v. Rolfe*, 16 N. H. 247; *Chesnut v. Shane*, 16 Ohio, 599.

In Endlich on the Interpretation of Statutes, at section 34, is this: "Another class of external circumstances which have, under peculiar circumstances, been sometimes taken into consideration, in construing a statute, consists of acts done under it; for usage may determine the meaning of the language, at all events when the meaning is not free from ambiguity." See, also, *Moers v. City of Reading*, 21 Pa. St. 188; *McKeen v. Delancy*, 5 Cranch, 22.

In speaking of the consideration to be given by the courts to a construction placed upon a statute by another department of the government, and to the practice and usage of such departments, etc., this court, in the case of *Board, etc., v. Bunting*, 111 Ind. 143, said: "We know judicially that it has always been the custom to make suitable provision for the sheriff's residence, and this custom has given a construction to the law which could not be disregarded, even if there was doubt as to the meaning of the statute."

In speaking of a practical construction given to a statute, the Supreme Court of Illinois said: "It has always been regarded by the courts as equivalent to a positive law." *Bruce v. Schuyler*, 4 Gilm. 221.

By another court the principle was stated, and it was said: "We can not shake a principle which in practice has so long and so extensively prevailed." *Rogers v. Goodwin*, 2 Mass. 475.

There are many cases which declare and enforce this principle; among them are *Stuart v. Laird*, 1 Cranch, 299; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat.

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264; *Ogden v. Saunders*, 12 Wheat. 213; *Minor v. Happersett*, 21 Wall. 162; *State v. Parkinson*, 5 Nev. 15; *Pike v. Megoun*, 44 Mo. 491; *People v. Supervisors*, 100 Ill. 495; *State v. French*, 2 Pinney (Wis.), 181. See, also, *Weaver v. Templin*, 113 Ind. 298.

The General Assembly, which passed the act of 1879, *supra*, also, and but a few days after the passage of that act, passed an appropriation bill. It may be proper to observe here that in the act of 1879, *supra*, "commissioners" is sometimes used as the equivalent of "trustees." It is so used in one instance in the appropriation bill above mentioned. In that bill, appropriating various sums to various objects, there was the following in relation to the benevolent institutions:

"For the maintenance of the hospital for the insane, one hundred and twenty-five thousand dollars, which shall include all receipts and earnings of the institution, as well as the amounts paid by the counties for clothing, in support of patients or otherwise, and out of which shall be paid the salaries of the president of the board, nine hundred dollars, and commissioners, at the rate of six hundred dollars per annum. * * * For the maintenance of the institution for the education of the blind, twenty-seven thousand dollars, which appropriation shall include all receipts and earnings of the institution, as well as amounts paid by counties for clothing or otherwise, in support of inmates, and out of which shall be paid the salaries of the president of the board and the trustees, at the rate of three hundred dollars per annum. * * * For the maintenance of the institution for the education of the deaf and dumb, fifty-five thousand dollars, which appropriation shall include all the receipts and earnings of the institution, as well as amounts received from payments of counties for clothing and otherwise, in support of inmates, and out of which shall be paid the salaries of the president of the board of [and] trustees, at the rate of four hundred dollars each per annum."

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It is very clear from that act, that the Legislature regarded the president of the boards as also a trustee in each of the boards, although he is mentioned therein, in each case, as the president of the particular board. Not only that, but in the appropriation for the institutions for the education of the blind and the deaf and dumb, he was very clearly given the salary of a trustee in the respective boards. In the appropriation for the hospital for the insane, it may not be so clear that the president was given the salary of a trustee in that institution, in addition to the nine hundred dollars fixed as the salary of the president as such, and yet the regarding of him as a trustee in the board for that institution, and the giving to him of the salary of a trustee in the other institutions, make it reasonably certain that the purpose was to give to him the compensation fixed for a trustee in that hospital, in addition to the amount fixed as the salary of the president.

It is a part of the history of the State, however, of which the courts will take notice, that the administrative department of the government construed both the acts providing for the several boards, for the president, for the compensation, and the appropriation act above, as meaning that the president, as president, and as a trustee in the several boards, should receive as compensation the sum of one thousand six hundred dollars per annum; and that that department paid to the predecessor of Harrison, and to him, that amount per annum, until about the time this action was commenced; and further, that both Harrison and his predecessor acquiesced in that construction, and accepted that sum as full compensation for their services as president, and as a member of, and trustee in, the several boards.

In that construction, practice and usage of the administrative department, the other departments have also acquiesced, although several sessions of the Legislature have intervened, or at least no objection has been made in any quarter until this action was commenced.

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Having acquiesced, as Harrison has, he should not now be allowed to claim more than \$1,600 per annum as compensation for his services, were he inclined to do so. While his counsel, in their brief, argue that he is, and has been, entitled to \$2,200 per annum, it is not apparent that he has not been satisfied to accept as payment in full \$1,600, the amount paid to him until this action was commenced. Upon the question of his acquiescence, see *Hahn v. United States, supra*, and, as bearing somewhat upon that question, see, also, *Rogers v. Goodwin, supra*.

As above stated, until about the time this action was commenced, Harrison drew \$1,600 per annum as in full of the compensation due to him. Since then he has been allowed to draw but \$900 per annum. He is now entitled to receive an amount, which, with the sum drawn, will make his compensation \$1,600 per annum. Here the attorney general interposes an objection, to which we need not, in our judgment, devote much time. It is, that to allow the president to draw over \$900 per annum is to make him the holder of two lucrative offices, in violation of the Constitution.

That objection, we think, is without merit. The president performs duties in more than one capacity, but those duties are in the same general line, and in promotion of one common purpose.

A township trustee, also, acts in a double capacity, and with a different official name. He is the trustee of the civil township and the trustee of the school township. And so, the lieutenant-governor presides over the Senate, and also acts as a member of the State Board of Equalization, and receives pay for both services. Those officers have so acted from the adoption of the Constitution until now, with the acquiescence of the people, and all of the departments of the State government, without any claim from any one that they have been holding two lucrative offices.

Other questions are discussed by appellee's counsel which might require serious consideration if it were necessary to

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decide them. The conclusions reached and already stated render a decision upon those questions unnecessary.

As the ruling of the court below in sustaining the demurrer to the complaint is in accord with what we here hold, the judgment is in all things affirmed.

Filed Dec. 15, 1888.

116	319
124	558

116	319
131	401

116	312
148	610

No. 13,493.

LAWRENCE v. BEECHER.

JUDGMENT.—*Merger.*—*Promissory Notes.*—*Mortgage.*—*Foreclosure.*—*Former Adjudication.*—Where a plaintiff declares upon a series of promissory notes, secured by mortgage, and executed by defendants severally liable only, and voluntarily elects to take a personal judgment against one of the defendants and only a decree of foreclosure against the others, the judgment is a merger of the whole cause of action against all the defendants in court, and a subsequent suit can not be maintained against any one of them.

SAME.—*By Default.*—A judgment by default can not go beyond the cause of action stated, but it may embrace not only the principal matters alleged, but also all of the necessary incidental matters.

From the Fulton Circuit Court.

G. W. Holman, for appellant.

J. S. Slick, F. H. Terry and J. W. Rickel, for appellee.

ELLIOTT, J.—The promissory note on which the appellant's complaint is founded is a several, and not a joint one, and is signed by J. N. Lowe, Eliza Lowe, John Beecher, and Martha E. Beecher, the appellee.

The answer is, that in a former action brought by the appellant against all the makers of the note there was a full and

final adjudication. To this answer the appellant replied, setting forth the proceedings and judgment in the action referred to in the answer. It appears from the allegations of the reply that the note here sued on was one of a series of five, executed by the makers to the appellant and secured by a mortgage. The complaint in the former action declares upon all the notes, prays judgment against all the makers, and the decree rendered in that action contains, among others, these provisions: "It is therefore ordered and adjudged by the court that the plaintiff have and recover of and from the defendant, John Beecher, the sum of \$786, now due, and and the further sums of \$780 due April 9th, 1886, \$744 due April 9th, 1887, and \$780 due April 9th, 1888, and his costs taxed at — dollars. And it is further ordered and decreed by the court that the equity of redemption of the defendants John Beecher, Martha E. Beecher, David Cooper and Caroletus Cooper, in and to the real estate hereinafter described, be barred and foreclosed." The decree was entered upon default.

The complaint in the foreclosure suit certainly authorized a personal judgment upon the notes due, for the default admitted its material allegations. It is true that a judgment upon default can not extend beyond the cause of action stated; it may, however, go to the full extent of the complaint, embracing not only the principal matters alleged, but also all of the necessary incidental matters. *Humphrey v. Thorn*, 63 Ind. 296; *Goble v. Dillon*, 86 Ind. 327.

The only question, therefore, in this phase of the case is, was there jurisdiction to render a personal judgment upon all of the notes sued on?

The plaintiff did take personal judgment against John Beecher upon all of the notes, but did not take judgment against any of the other defendants. It appears, therefore, that he did elect to take personal judgment against one of the several debtors, and as to that debtor, at least, it seems

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quite clear that the matter can not be again litigated. It is enough to assign two reasons for this conclusion :

First. The plaintiff asserted a right to this judgment, and he thus elected as to his remedy. It is not for him to say that he was not entitled to the relief he sought and received. It may, possibly, be true that it was error to render the judgment, but, granting this, still the judgment can not be collaterally impeached. *Robertson v. Huffman*, 92 Ind. 247.

The plaintiff asked and was awarded a judgment that is not void, and it is difficult to perceive why that judgment did not merge the cause of action, since it stands against all the parties until overthrown by a direct attack.

Second. The complaint set forth all the notes, demanded a judgment upon them all, and this demand the decree enforced, so that the judgment was upon a matter which might have been litigated, and was litigated, under the issue tendered. Under the rule declared in *Fischli v. Fischli*, 1 Blackf. 360, and reaffirmed again and again, the adjudication was final and conclusive. *Griffin v. Wallace*, 66 Ind. 410; *Ulrich v. Drischell*, 88 Ind. 354, and cases cited; *Moore v. State*, 114 Ind. 414 (421).

There was, therefore, a final judgment rendered at the solicitation of the appellant, merging the cause of action as to one, at least, of the makers of the note sued on.

We assume, as established, the proposition that there was a judgment, rendered upon the demand of the appellant, merging the cause of action as to one of the makers of the note on which the complaint rests. It was, no doubt, the right of the appellant, had he so elected, to have dismissed as to part of the defendants, or to have so framed his decree as to reserve his right to a personal judgment. *Rose v. Comstock*, 17 Ind. 1; *Erwin v. Scotten*, 40 Ind. 389.

We fully agree with the appellant's counsel that a simple decree of foreclosure does not necessarily bar a right to subsequently obtain personal judgment on a promissory note secured by a mortgage. *Muncie Nat'l Bank v. Brown*, 112

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Ind. 474; *Hensicker v. Lamborn*, 13 Ind. 468; *O'Leary v. Snediker*, 16 Ind. 404; *Jenkinson v. Ewing*, 17 Ind. 505.

But this rule is not extensive enough to embrace a case where a personal judgment is taken as to one of the defendants liable on the note, and no disposition of the case as to the others is directly made, further than to decree that their equity of redemption is barred. If nothing more than a decree of foreclosure had been entered, we should have a very different case, but, as counsel concede, there was a personal judgment as to one of the makers of the note. The question, therefore, is, what is the effect of a judgment so taken as to the other makers of the note? If it merged the note in the judgment, then, clearly enough, there is no cause of action. If it did not merge the note as to the appellee, then the cause of action still exists. The pivotal question, to which we come at last, is this: Did the judgment merge the cause of action now asserted against the appellee?

If the appellee had not been sued in the former action, then it would be clear that the judgment would not have released her, nor have merged the cause of action, for a plaintiff may rightfully sue one or all of the makers of a several promissory note, and take judgment. *Giles v. Canary*, 99 Ind. 116. But the defendants were all sued and judgment was taken against one of them, so that the case is not within the rule acted upon in the case cited. Nor is the question presented here as it was in *State, ex rel., v. Roberts*, 40 Ind. 451, for, here, the court did not dismiss the case, over the objection of the plaintiff, as to the parties against whom no judgment was taken, as was done in the case cited, but, on the contrary, rendered a final judgment against the defendant whom the plaintiff elected to hold liable for the whole amount of the debt. This case differs, too, from that cited in another essential particular, and that is this: Here the question comes up in a collateral action, while there it arose directly upon appeal. Here we are met by the question whether a plaintiff, having voluntarily elected to take judg-

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ment against all of several defendants, then in court, can subsequently sue upon the cause of action on which that judgment was rendered. We can see no escape from the conclusion that the judgment operated as a merger of the whole cause of action against all of the defendants in court. The general rule undoubtedly is, that a final judgment extinguishes and merges the cause of action. 1 Herman Estop., section 466. There is nothing impressing upon this case the features of an exception to the general rule, and the general rule prevails unless the particular case possesses the essential elements of an exception.

Where a plaintiff voluntarily elects to take a personal judgment against one of a number of defendants severally liable, without in any way preserving his rights against others then legally before the court, the presumption is that he is content with that judgment, and that his contentment is due to the fact that he received at the hands of the court all the relief that he was justly entitled to receive. If he desires to prevent this result he must take some steps, as he well may, to counteract this presumption. If he takes no such steps, but elects to take a final personal judgment against one of the defendants and takes only a judgment of foreclosure against the others, he can not justly complain if this presumption prevails against him. Naturally this is the result, since he must be deemed to have obtained all the relief to which equity and justice entitled him. If he desired personal judgment against all the defendants, instead of a decretal order barring their equity of redemption, he should have secured it when he had the opportunity, and not have disturbed the courts and vexed the parties by many actions. We think this principle is substantially asserted by *Richardson v. Jones*, 58 Ind. 240, and that the argument of appellant's counsel, able and ingenious as it is, fails to meet or avoid it.

The reply must be judged by the facts it pleads, and not by the mere conclusions of the pleader. *Neidefer v. Chastain*,

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71 Ind. 363. The general conclusion of the pleader that there was no adjudication of the personal liability of the defendants in the foreclosure suit, other than that shown in the decree, does not change the character and effect of the material facts pleaded. This rule was applied in a case very like the present. *Richardson v. Jones*, *supra*.

Judgment affirmed.

Filed Dec. 15, 1888.

No. 13,766.

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116	317
117	599
119	170.
119	235
119	429
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131	106
116	317
136	647
116	317
143	555
143	566
116	317
147	18
147	318

PARTNERSHIP.—Firm Note.—Endorsement by Individual Partners.—A creditor who holds a note made by a firm and endorsed by the individual partners, has a valid joint obligation against the firm and at the same time a distinct, several and separate obligation against those who have signed as endorers.

SAME.—Individual Property.—Conveyance to Firm to Secure Debt.—A conveyance of separate property, executed in good faith by a partner to secure a debt owing by him to the firm of which he is a member, is valid as against the individual creditors of the partner.

SAME.—Appointment of Receiver.—Operates as Assignment.—The appointment of a receiver for an insolvent firm operates to all intents and purposes as an assignment of the firm assets, with all the securities incident thereto, for the benefit of the firm creditors.

SAME.—Individual Property Conveyed to Firm.—Administration by Receiver.—Where individual partners, being indebted to the firm, convey thereto their separate property, either as payment or as security for the payment of their *bona fide* debts, such property, upon the subsequent insolvency of the firm and the appointment of a receiver, vests in the receiver for the benefit of the creditors of the firm.

SAME.—Promissory Note.—Endorsement.—Preference of Creditor.—A creditor who loans money to a firm upon promissory notes executed by the firm

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and endorsed by the individual partners, without knowledge that such partners had previously conveyed to the firm their separate property to secure their debts due to the firm, is not, upon the subsequent appointment of a receiver for the firm, entitled, as an individual creditor, to payment out of the separate property so conveyed, in preference to the creditors of the firm.

From the Marion Superior Court.

F. Winter, A. Baker and E. Daniels, for appellants.

B. Harrison, W. H. H. Miller and J. B. Elam, for appellee.

MITCHELL, J.—Prior to the 15th day of July, 1884, Stoughton A. Fletcher, Thomas H. Sharpe, Ingram Fletcher and Albert E. Fletcher were partners, carrying on a general banking business in the city of Indianapolis, under the firm name of Fletcher & Sharpe. The firm became insolvent, and upon the application of one of the partners, William Wallace, Esq., was, on the date above mentioned, duly appointed by the superior court of Marion county to take charge of the assets of the firm, as receiver.

During the pendency of the receivership, Winslow, Lanier & Co., bankers of the city of New York, filed an intervening petition, in which they represented that the firm of Fletcher & Sharpe was indebted to them in a large amount, which indebtedness was evidenced by two promissory notes, executed by the firm, and secured by the separate endorsement of three of the partners individually. The intervenors asserted the right to participate ratably in the assets of the firm, and also to be preferentially paid any balance of their claim remaining unpaid, out of the proceeds of certain individual property which they averred those members of the firm who had become liable as endorsers had transferred to a trustee for the benefit of the firm prior to the declaration of insolvency, and which, it was alleged, had since been transferred to the receiver.

There was a hearing upon issue taken, and upon due request the court found the facts specially, and stated conclu-

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sions of law thereon adverse to the claim of the intervenors for a preference.

The only facts specially found material to the determination of the questions involved are, in substance, that, on the 21st day of January, 1884, the persons above named, having carried on the banking business as partners, under the firm name of Fletcher & Sharpe, for the period of ten years or more, entered into a new partnership agreement, at which time, as subsequent events proved, the firm, as well as the individual members thereof, although owning a large amount of property, were of doubtful solvency, if they were not, indeed, actually insolvent. Two of the partners, viz., Ingram and Albert E. Fletcher, were each largely indebted to the firm, the debt of the first named being \$448,286, while that of the last named amounted to \$300,000, or thereabouts. Each of the above named partners owned a large amount of individual property, which they, as well as the other members of the firm, believed would sell for more than sufficient to pay the amounts due from them respectively to the firm. It was accordingly stipulated, as part of the new agreement, that Ingram and Albert E. Fletcher should severally convey and transfer all their individual property, real and personal, to a trustee in trust, to be sold and converted into money by the firm, and the proceeds applied to the liquidation of their respective debts due the firm, and the residue, if any, placed to the credit of each as capital stock. It was also agreed that Thomas H. Sharpe, one of the partners, should convey the undivided one-half of a certain bank building, owned by himself and the two Fletchers above named as tenants in common, to the firm, subject to an encumbrance which, it was stipulated, the firm should pay.

In pursuance of the agreement above mentioned, and upon the considerations therein named, and no other, the several partners, their respective wives joining, made conveyances of their individual real estate according to the terms of the new agreement, the conveyance by Sharpe having been made

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to the firm on the 23d day of January, 1884, while the deeds from the Fletchers to the trustee were executed on the 2d day of February, 1884. The trustee subsequently conveyed the Fletcher property to the receiver. The value of the property conveyed by Ingram and Albert E. Fletcher did not, in either case, equal the amount due from them respectively to the firm.

The court finds that the conveyances were made in good faith, in order to provide for the payment of debts actually due the copartnership from the several partners, and to enable the firm to pay its debts and carry on its business. Afterwards, in April and June, 1884, Fletcher & Sharpe made two notes, one for \$25,000, the other for \$20,000, both payable to the firm of Fletcher & Sharpe. These notes were endorsed by the firm, whose endorsement was followed, in regular course, by that of Thomas H. Sharpe, Ingram Fletcher and Albert E. Fletcher. Upon the notes so endorsed the intervenors, Winslow, Lanier & Co., loaned to the firm of Fletcher & Sharpe the amount of money specified in each note respectively.

The intervenors did not know of the conveyances above mentioned made by the several partners to the firm of Fletcher & Sharpe, at the time of making the loan, the endorsement of the partners having been accepted in order to obtain the security of their personal liability on the notes. No inquiry was made by Winslow, Lanier & Co. concerning the individual property of the several members of the firm of Fletcher & Sharpe, nor was there any representations made by any member of the latter firm in that regard.

Subsequently a receiver was appointed by the Marion Superior Court, who took possession of all the property and assets of the firm, including the property conveyed to the firm and to the receiver as above mentioned in pursuance of the partnership agreement made on the 21st day of January, 1884.

The question is, whether or not upon the foregoing facts

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the intervenors were entitled to priority of payment over other firm creditors out of the property conveyed to the firm by the several partners?

There seems to be no dispute, as indeed there could not well be, upon the proposition that a creditor who holds a note of which a firm are the makers, and one or more members thereof endorsers, has in his hands a valid joint obligation against the firm, and at the same time a distinct, several and separate obligation against those who have signed as endorsers. This result flows from the fact that the contract of an endorser is entirely independent of and distinct from that of the maker, each contract being in itself, when the endorsement is in regular course, conclusive in its legal import. The creditor holding a note so made and endorsed, may, therefore, pursue his remedy against the partners as makers, and he may also proceed against those individually liable as endorsers. When the property of the firm, or the individual estates of the members bound as endorsers, are being judicially administered, the creditor is entitled to participate with the partnership creditors in the joint estate, and he may at the same time avail himself of any appropriate remedy he would otherwise have against the endorsers or their respective estates. He may receive dividends from the joint estate as a partnership creditor, and from the separate estate of the partners liable on their contract of endorsement as an individual creditor. *Wilder v. Keeler*, 3 Paige, 167, 176; *Mead v. Nat'l Bank*, 6 Blatch. 180; *Emery v. Canal Nat'l Bank*, 3 Cliff. 507; *In re Bradley*, 2 Biss. 515; *In re Babcock*, 3 Story, 393.

This is upon the principle that one who holds two independent obligations as security for a debt, is entitled to avail himself of both, until the debt is once completely satisfied.

Having established the right of a creditor who holds the note of a firm, endorsed by some or all of its members, to participate in the joint estate of the partners to the exclusion

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of individual creditors, as well as in the separate estate of the endorsers to the exclusion of partnership creditors, and resting their ultimate right for preference on this proposition, counsel for the intervenors plausibly contend that, since the conveyances of their individual property made by the several members of the firm of Fletcher & Sharpe, in pursuance of the new partnership agreement, were intended merely as security for debts due from those members to the firm, such conveyances, although absolute in form, constituted in fact only mortgages. Therefore it is said the property thus conveyed remained the individual property of the several members, subject only to a mortgage in favor of the firm, notwithstanding the conveyances. Hence, the argument proceeds, the rights of the partnership creditors having become fixed and vested in the partnership property by the appointment of a receiver, the correlative rights of the individual creditors in the individual property, being compensatory, must have become fixed and vested in the individual property of the several members at the same time. The conclusion is said to follow, since the intervenors, who occupy the double character of individual and partnership creditors, have thus obtained a vested right in, or lien upon, the individual as well as the partnership property, that neither the insolvent firm of Fletcher & Sharpe, nor the receiver, will be heard to assert the prior mortgage in favor of the firm upon the separate property of the individual members as against the subsequent lien of the intervenors, who are also creditors of the firm. The joint creditors, represented by the receiver, it is said, have no rights except such as they derive by subrogation from Fletcher & Sharpe, and since the latter could not have come into competition with the intervenors, their own creditors, in obtaining payment out of the individual property conveyed as above, their joint creditors can not do so.

It is undoubtedly true that a debtor will not be permitted to avail himself of a prior security if to do so would defeat

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the collection of a debt which he is legally or equitably bound to pay.

Where property is encumbered as security for the payment of two debts, if the holder of the first lien is under a duty ultimately to pay the debt secured by the second, it would be manifestly inequitable to permit him, in case the property was insufficient to pay both, to set up the prior lien to the discomfiture of his own creditor. Thus, if a partner borrow money on his individual security or credit, although for the use of the firm of which he is a member, while he might have a partner's lien, *inter sese*, he has none against the firm creditors, because he himself owes the joint debts due the creditors of the firm. 2 Lindley Partnership, 683; *Ketchum v. Durkee*, 1 Hoff. Ch. 538.

Upon like principles, the assignee of the last of a series of notes secured by mortgage is entitled to preference over the mortgagee, who retains a prior note, in case the latter became liable for the payment of the last note by his contract of endorsement. *Wilber v. Buchanan*, 85 Ind. 42; 2 Jones Mort., section 1701.

The facts found by the court, however, do not make the present a case for the application of the principles above stated.

Without conceding that the conveyances of their separate property by the individual members of the firm of Fletcher & Sharpe, in pursuance of the agreement above referred to, constituted mortgages merely, and dissenting entirely from the view that the appointment of a receiver of the assets of the firm in any way affected the relation of the individual creditors to the separate property of the several members, so as to give those creditors a vested right in, or lien upon, the separate property of the partners, yet, if these points were conceded to the intervenors, we are unable to see how it would aid their purpose, unless the conveyances referred to were invalid, and of no effect as against individual creditors. Whether the deeds operated as absolute conveyances, or as

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mortgages, there is no question but that they were executed some months prior to the appointment of the receiver, and before the intervenors became creditors, either of the firm of Fletcher & Sharpe, or of any of its individual members. Nor is there any dispute but that the conveyances were made either to pay or secure actual subsisting debts due from the owners of the property respectively to the copartnership.

The property having been transferred to secure the payment of *bona fide* debts due the firm, long before the receiver was appointed, as soon as a receiver was appointed it vested in him for the benefit of the creditors of the firm. The effect of the conveyances very clearly was to convert that which was theretofore individual property into property belonging to the firm.

Debts due from the individual members of a partnership, like other debts due the firm, become assets in the hands of a receiver, who stands in some respects as an assignee of the firm property, and are to be collected and applied to the payment of firm debts accordingly. If such debts are secured by mortgage, granting that the conveyances in question constituted mortgages only, or otherwise, the security, like the debt, stands for the benefit of the firm creditors, unless the security was taken in violation of the rights of individual creditors. The inquiry then ultimately comes to this: Is a conveyance of separate property, executed in good faith by a partner to secure a debt owing by him to the firm of which he is a member, valid as against the individual creditors of the partner? Upon principle and authority this question must be answered in the affirmative.

It is settled everywhere, that where the assets of a partnership, or the individual property of the members of a firm, are brought under the jurisdiction of a court for judicial administration, the equitable rule of distribution will be applied, and the partnership assets will be devoted first to the payment of the firm debts, and the individual property of the several partners to their individual debts respectively.

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But where the partnership assets remain under the control of the partners, they have the power to appropriate any portion of it to pay or secure the individual debts of the members of the firm. Thus, in *Fisher v. Syfers*, 109 Ind. 514, this court said :

“Where debts are fairly owing by either partner individually, the mere preference of individual over partnership creditors by the execution of a chattel mortgage, in the firm name, or by authority of the partners, upon the property of the firm, is not of itself such a fraud upon the partnership creditors as will authorize the setting aside of the chattel mortgage at the suit of a creditor. *Nat'l Bank, etc., v. Sprague*, 20 N. J. Eq. 13 ; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46 ; *Kennedy v. Nat'l Union Bank*, 23 Hun, 494 ; *Jones Chat. Mort.*, section 44 ; *In re Kahley*, 2 Biss. 383.”

So in the same decision it is said :

“The rule that obtains in the distribution of the estates of partners, and under which partnership creditors are entitled to priority of payment out of the partnership assets, is an equitable doctrine for the benefit and protection of the partners respectively. ‘Partnership creditors have no lien upon partnership property ; their right to priority of payment out of the firm assets, over the individual creditors, is always worked out through the liens of the partners.’ *Warren v. Farmer*, 100 Ind. 593 ; *Trentman v. Swartzell*, 85 Ind. 443. Upon the death of one partner, or where the firm becomes bankrupt, or where the partnership assets are being administered by a court, the rule of equitable distribution is applicable to its fullest extent. Where, however, the partners have the possession and control of their own property, they have the right to make any honest disposition of it they see fit ; each has the right to waive his equitable lien, and together they may sell, assign or mortgage the property of the firm, to pay or secure either an individual debt of one of the partners, or the debts of the firm.”

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The equity of the creditors is a derivative one, and arises out of the principles of subrogation, entitling them to enforce the equities subsisting between the partners, so long as the right of any of the partners has not been waived. But the partners may waive their rights either in the partnership property or in that owned by them individually. *Dunham v. Hanna*, 18 Ind. 270; *Case v. Beauregard*, 99 U. S. 119, and cases cited.

It being thus settled that partners, while they remain in the possession and control of partnership property, and before it is brought under the jurisdiction of a court for administration, may create liens upon the property, or appropriate it to pay or secure the individual debts of the partners, the correlative right of an individual partner to deal in like manner with his own separate property, and appropriate it to pay or secure his own debt to the firm or a debt owing by the firm to a third person, would seem to follow as a matter of course. Thus, in *Jackson v. Cornell*, 1 Sandf. Ch. 348, speaking of a general assignment by an insolvent partner, in which the assignor gave preference to certain creditors of the firm to the exclusion of his own, the Vice-Chancellor said: "Let the partner actually apply his own property as he thinks proper, while he administers it himself. But when he avails himself of the lenient provisions of our law, which enable him to prefer such creditors as he pleases, on making an assignment, and to select his own trustee, let us require him to avoid violating the plainest principles of equity."

This decision, while holding that a court of equity will neither tolerate nor administer a general assignment by a partner of his separate property, in which he prefers partnership over individual creditors, nevertheless fully recognizes the right of a partner to "apply his own property as he thinks proper, while he administers it himself."

The limitation upon the power of partners, or of individuals, to deal with or dispose of partnership or individual property, while it remains in the possession and under the

dominion of the owners, must in either case be that the disposition or appropriation be honestly made, without any fraudulent intent to divert the property from the payment of their *bona fide* debts, as to injure their creditors, and with no purpose to reserve some benefit to themselves personally by the arrangement. That the disposition results in the payment of one *bona fide* debt to the exclusion of another creditor, whose demand is equally meritorious, is of no consequence. *Gilbert v. McCorkle*, 110 Ind. 215; *Bedell v. Chase*, 34 N. Y. 386; *Gregory v. Harrington*, 33 Vt. 241; *Covanhovan v. Hart*, 21 Pa. St. 495; *Smith v. Selz*, 114 Ind. 229.

Whatever a partner may do with his individual property, in respect to paying or securing debts of the firm, it can not be doubted that he has the right, as was done in the present case, to appropriate it to the payment or securing of his own debt to the firm of which he is a member.

We are thus led to the conclusion that the conveyances by the individual members of their separate property to the firm of Fletcher & Sharpe, whether those conveyances be regarded as having been made in payment of, or as security for, debts due the firm, or whether they be considered as advancements made by the several partners to the capital stock of the firm, were valid and effectual as against individual creditors, to transfer a vested interest in the property thus conveyed to the firm as of the date on which the conveyances were executed.

Having seen that the conveyances in question were executed while the several partners were in control of and administering their own property, long before the assets of the firm came under judicial administration, and that the conveyances constitute valid transfers of the property therein described to the firm, it results that the individual property, out of which the intervenors claim the right to be preferentially paid, was legitimately part of the assets of the firm of Fletcher & Sharpe when the receiver was appointed.

The appointment of a receiver, the firm being insolvent,

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operated to all intents and purposes as an assignment of the firm assets, with all the securities incident thereto, for the benefit of the firm creditors. This being so, there is no principle of law or equity upon which it can now be said that the firm creditors shall be estopped to avail themselves of the benefit of property which the firm had the right to acquire, and which it had acquired, whether in payment or as security is immaterial, upon an adequate consideration paid.

Whether, in case the controversy were between the intervenors and Fletcher & Sharpe, the latter would be estopped to assert their prior right to the property in question, we do not now decide.

Fletcher & Sharpe having become insolvent, and having in effect assigned their partnership effects for the benefit of their creditors, the receiver, representing an equal equity, and having the legal title in dispute, can not be postponed to the claims of an individual creditor. Where the equities are equal, he is in the situation of advantage who holds the prior legal right.

It is only necessary to say in conclusion that we have fully considered what has been said in relation to the fraudulent character of the conveyances referred to, as to future creditors, and without stating our reasons at large, our conclusion is, that it does not appear, either in the facts found or in the evidence, that the contention of the intervenors in that respect is maintained. The conveyances seem to have been made in good faith for the benefit of the firm creditors, without any reservation or advantage to the grantors.

The judgment is therefore affirmed, with costs.

Filed Sept. 21, 1888; petition for a rehearing overruled Dec. 14, 1888.

Board of Comm'rs of Bartholomew Co. v. State, ex rel. Baldwin, Att'y Gen'l.

No. 9824.

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THE BOARD OF COMMISSIONERS OF BARTHOLOMEW COUNTY
v. THE STATE, EX REL. BALDWIN, ATTORNEY GENERAL.

COMMON SCHOOLS.—School Lands.—Income From.—Suit to Recover.—County Commissioners.—Attorney's Fees.—Unlawful Diversion of Funds.—Liability of County.—It is the duty of the board of county commissioners to prosecute an action against a township trustee who refuses to account for the income of land belonging to the congressional township fund, and in the discharge of that duty it is proper for such board to employ attorneys and pay reasonable fees for their services out of proper funds; but such fees can not be paid out of the moneys recovered in such proceeding, as such moneys, under the compact between the United States and the State of Indiana, and under section 3 of article 8 of the State Constitution, are inviolably appropriated to the inhabitants of the proper township for the use of the common schools, and for any deduction made therefrom for attorney's fees or otherwise the county is liable, under sections 6 and 7 of the article cited, with interest from the date of diversion.

SAME.—Judgment.—Res Judicata.—A judgment of the board of commissioners rejecting a claim filed by a township trustee asking the board to pay into the county treasury, to the credit of the township, school funds unlawfully diverted to the payment of attorneys' fees, is not a bar to an action by the State to compel the board to make good the amount so unlawfully diverted.

From the Bartholomew Circuit Court.

F. T. Hord, for appellant.

D. P. Baldwin, Attorney General, *R. Hill*, *J. W. Nichol* and *J. S. Frazer*, for appellee.

Howk, C. J.—In this case the State of Indiana, on the relation of its attorney general, for the use of its common school fund, presented to the board of commissioners of Bartholomew county, for allowance and payment, a claim in two paragraphs. This claim was disallowed and rejected by the county board, and the State appealed from such action to the circuit court of the county. There the county board, as de-

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fendant, answered in five paragraphs, of which the first was a general denial of the State's claim or complaint herein, and each of the other paragraphs stated a special defence. The State's demurrers to each of the special paragraphs of answer, for the alleged insufficiency of the facts therein to constitute a cause of defence to the State's claim or complaint, were sustained by the court. The State withdrew the second paragraph of its claim. The county board withdrew, also, the first paragraph of its answer in general denial of the State's claim or complaint, and declined to answer further. Thereupon the cause was submitted to the court, as upon default, and the court assessed the State's damages in the sum of \$2,482, and rendered judgment accordingly.

Errors are assigned here by appellant, defendant below, which call in question the overruling of its demurrer to the State's claim or complaint, the sustaining of the State's demurrers to each of the special paragraphs of defendant's answer, and the overruling of its motion for a new trial.

It is manifest, we think, from what we have already said, that this case is presented for our consideration solely upon the pleadings. No evidence was introduced in the court below, and none was needed, if the court did not err in its rulings upon the demurrer to the claim or complaint, or upon the demurrers to the several paragraphs of defendant's answer.

In its claim or complaint herein the State alleged that, on the 5th day of June, 1873, in an action then pending in the court below, wherein the State of Indiana, on the relation of said board of commissioners of Bartholomew county, was plaintiff, and Joel S. Davis and others were defendants, on the bond of said Joel S. Davis, as trustee of Sand Creek township, in Bartholomew county, the State of Indiana, by the consideration of said court, recovered of defendants, Joel S. Davis and others, for the use of the common schools of the State and as belonging to the school revenue for tuition thereof, the sum of \$8,270.68; that afterwards, on the 7th

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day of August, 1878, said judgment and the interest and costs thereon were fully paid and satisfied by said defendants, Davis and others, and the principal and interest of said judgment were fully received by said board of commissioners; that it then became the duty of said board of commissioners, immediately upon its receipt of said money as aforesaid, to pay the same over to the county treasurer of Bartholomew county; but the State averred that said board of commissioners did not then, nor at any time since, pay to such county treasurer, or to any other person or officer authorized to receive the same, the full amount so paid upon such judgment as principal and interest; but, on the contrary, said board of commissioners unlawfully and without right retained from said sum of principal and interest, and converted to its own use, a large amount thereof, to wit, the sum of \$3,000, which sum, with interest thereon since said conversion thereof, was still due and owing from said board of commissioners to said school revenue for tuition, and was wholly unpaid. Wherefore, etc.

In the first paragraph of its special answer to the State's claim or complaint herein, the board of commissioners of Bartholomew county, defendant below and appellant here, alleged that section 16 of township 8 north, of range 6 east, known as the Congressional School Section, was situate in Sand Creek township, in Bartholomew county, and, for sixty-five years last past, had been held, leased and managed by the trustee of said township; that during all those years it was necessary from time to time to make and erect necessary improvements on said section, such as buildings, fences, etc., to enable said trustee to lease the same; that, during said time, said trustee had paid for said improvements out of the rents derived from said land, and had leased the land, receiving rents payable in money, property, or improvements on such land; that, during all of said time, said trustee had been required and compelled, from time to time, to employ attorneys to institute actions in the several courts of this

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State to enforce contracts relating to such land, to recover possession thereof upon the termination of leases, to sue for and recover rents accruing from the land, to enjoin the commission of waste, and to recover damages for waste committed; that said trustee had, at all times, paid said attorneys for their said services out of the funds collected for rents, etc., from said land, and, during all said time, the said rents so collected by said trustee had been applied to the payment of all expenses attendant upon the management and control of said land, and such expenses had not been paid in any other way or out of any other fund, and the reports thereof, which said trustee had annually made to said board of commissioners, had been approved and ratified by said board, and the residue of said rents so collected, after the payment of all expenses, had been applied to the tuition fund of said congressional township, wherein said land was situate.

Defendant further averred that Joel S. Davis was duly elected and qualified as trustee of said Sand Creek township, on the — day of —, 1868, and held said office continuously thereafter, as his own successor, until the — day of —, 1874; that said Davis, as such trustee, collected the rents of said school section 16, and failed and refused to report annually the income derived from said school land, and to pay into the county treasury all rents collected by him, but held and retained the same, and it became the duty of defendant to institute an action against said trustee Davis and the sureties on his official bond to recover the same, and, for the proper and successful prosecution of said action, it became and was necessary that defendant should employ competent and skilful attorneys; that the defendant, who was authorized and required to collect said fund, employed Simon Stansifer and Francis T. Hord as its attorneys to institute and prosecute such action against said trustee Davis and the sureties on his official bond to a final determination; that the attorneys so employed by defendant, under its order and direction, on the — day of —, 1873, commenced such

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action in the court below, in the name of the State, on the relation of defendant herein, against said trustee Davis, and the sureties on his official bond as trustee of Sand Creek township, charging in its complaint therein; among other things, that said section 16, above described, was in Sand Creek township—that before and on the fourth Monday of March, 1873, said Joel S. Davis, as such trustee, had in his hands, as rents and income of such section 16, received by him as such trustee, and interest thereon, to wit, the sum of \$12,000, which he had failed to report to the auditor of said county and pay into the county treasury, but had wrongfully withheld and retained the same—and demanding judgment for \$12,000, etc.; that numerous issues were formed on the complaint in said action, and, upon the trial thereof, the plaintiff therein, on the 5th day of June, 1873, recovered in such action in the court below a judgment against the defendants therein for the amount of rents held by said trustee Davis, and ten per cent. penalty thereon, making a sum total of \$8,270.68, and costs; which were the same proceedings and judgment described in the complaint herein, and no other or different.

And defendant further averred that the defendants in said judgment afterwards appealed therefrom to the Supreme Court of this State, by which court, at its November term, 1873, said judgment was in all things affirmed; that thereafter a writ of error was sued out of the Supreme Court of the United States by the defendants in such judgment, whereby it was sought to have the judgment of the Supreme Court of this State reversed, for alleged error therein; that afterwards, at the October term, 1876, of the Supreme Court of the United States, the judgment of the Supreme Court of this State was in all things affirmed; that the above named attorneys, employed as aforesaid by defendant herein, attended to the conduct and management of said action in the court below, in the Supreme Court of Indiana and in the Supreme Court of the United States, and until the final de-

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termination thereof and the payment of said judgment; that the services of said attorneys were necessary to the proper and successful prosecution of said action, and a reasonable fee and compensation for the services of each of said attorneys was the sum of \$1,000; that, on the 22d day of September, 1877, said Stansifer and Hord, as such attorneys for defendant herein in said suit, received from said Davis, trustee as aforesaid, upon and in part satisfaction of said judgment, the sum of \$2,000, and no more; that no part of such sum of \$2,000 was ever in the county treasury of said Bartholomew county, but that the same was then and there applied by said Stansifer and Hord, attorneys as aforesaid, with the consent and approval of the defendant herein, to the payment and discharge of their respective fees of \$1,000 each, in the aforesaid suit of this defendant in the name of the State against said trustee Davis, and the sureties on his official bond as trustee of Sand Creek township; that the balance of the aforesaid judgment (except said sum of \$2,000) was paid to the treasurer of said Bartholomew county, and not to the defendant herein.

We have given a full summary of the facts alleged by defendant in the first paragraph of its answer herein, for the purpose of showing the real point in controversy herein between it and the State's relator.

In section 6 of an act of Congress approved April 19th, 1816, "to enable the people of the Indiana territory to form a Constitution and State government," etc., certain propositions were offered to the Convention of such territory, "when formed, for their free acceptance or rejection, which, if accepted by the Convention, shall be obligatory upon the United States." Of these propositions the *first* reads as follows: "That the section numbered sixteen, in every township, and when such section has been sold, granted or disposed of, other lands, equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools."

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By an ordinance duly passed on the 29th day of June, 1816, the territorial convention of Indiana territory, formed and held under the enabling act of Congress aforesaid, accepted "the propositions of the Congress of the United States, as made and contained in their act of the 19th day of April, 1816."

By this acceptance of the first proposition of Congress, above quoted, section 16 described in the first paragraph of of defendant's answer herein was granted to the inhabitants of congressional township 8 north, of range 6 east, "for the use of schools." This section, as we have seen, was situate in Sand Creek civil and school township, of which township Joel S. Davis was trustee from 1868 to 1874, inclusive.

By section 4328, R. S. 1881, in force at the time, the care and custody of all lands belonging to the congressional township fund were given to the trustee of the civil township, in which the same were situated, who should report annually to the auditor, by the fourth Monday in March, the annual income derived therefrom to the township; which report should contain a fully itemized statement of his rent account of such lands, to whom and for what amount the same were rented to each tenant, and whether such rents had been collected or not; and it should be "the duty of such trustee to pay into the county treasury all rents collected and reported by him as aforesaid."

During his term of office, Joel S. Davis, trustee of Sand Creek township, failed and refused to make such report of the annual income derived from said congressional school section 16, and to pay into the county treasury all rents collected by him from said section. It then became the duty of defendant herein to employ counsel and institute a suit on the official bond of said Joel S. Davis, against him and his sureties therein, to recover damages for the aforesaid breach of his official duty; and in such suit judgment was rendered and affirmed in favor of this defendant, as described in the

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first paragraph of its answer. See *Davis v. State, ex rel.*, 44 Ind. 38; *Davis v. Indiana*, 94 U. S. 792.

Out of the proceeds of such judgment the sum of \$2,000 was applied, with the consent of this defendant, to the payment of the fees of its attorneys for their services in the prosecution of its aforesaid suit against trustee Davis and his sureties in the Bartholomew Circuit Court, in this court, and in the Supreme Court of the United States. The sum thus applied to the payment of such attorneys' fees, in the suit aforesaid, is the sum for which defendant is sued in this action.

On behalf of the State, it is claimed by the attorney general that all the moneys recovered by defendant herein of trustee Davis and his sureties in the judgment aforesaid, under the Constitution and laws of this State, were income from a part of the principal of the common school fund, which was a "perpetual fund," and were "inviolably appropriated to the support of common schools, and to no other purpose whatever."

On the other hand, defendant's counsel contend with much learning and ability, that the necessary and reasonable fees of the attorneys of such county board, for their services in the prosecution of its suit against trustee Davis and his sureties, were a proper and lawful charge upon the moneys collected by means of such suit, and were rightfully withheld and retained by said attorneys, with defendant's consent, out of such moneys.

In section 2 of article 8 of our State Constitution of 1851 (section 183, R. S. 1881), it is declared that "The common school fund shall consist of the congressional township fund. and the lands belonging thereto," etc.

Section 3 of the same article of the State Constitution (section 184, R. S. 1881), declares as follows: "The principal of the common school fund shall remain a perpetual fund, which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the

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support of common schools, and to no other purpose whatever."

Section 6 of the same article of the State Constitution (section 187, R. S. 1881), reads as follows: "The several counties shall be held liable for the preservation of so much of the said fund as may be intrusted to them, and for the payment of the annual interest thereon."

In *Davis v. State, ex rel., supra*, the right of the board of commissioners of Bartholomew county to bring and maintain the action against trustee Davis and his sureties, for the recovery of the rents of said school section, was vigorously questioned here by appellants' counsel. But the court there held that, "by the act of March 7th, 1873" (section 4328, *supra*, the substance of which we have heretofore given), "the money derived from the rent of the unsold sixteenth section is intrusted to the counties within the meaning of section 6 of article 8 of our Constitution," section 187, above quoted. And the court there said: "We think there is no doubt as to the power of the board of commissioners to bring this action on their relation." We go further, and say that the board of commissioners not only had the power, but, under the Constitution and laws of this State, it was the duty of such board to bring and prosecute that action to a final judgment in the court of last resort.

In the discharge of such duty it was necessary, of course, that the board of commissioners should, as it did, employ attorneys learned in the law to bring and prosecute that action; and it was eminently right and proper, we think, that such board should pay its attorneys their reasonable fees for services in that action. But such payment ought to have been made by the board of commissioners out of any moneys in the county treasury not otherwise appropriated, and not out of the moneys collected on the judgment against Davis and others. For, all the moneys collected on that judgment were income from lands belonging to the congressional town-

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ship fund, and were, and are, under our Constitution and laws, "inviolably appropriated" to the inhabitants of congressional township 8 north, of range 6 east, "for the use of schools." For this use the moneys so collected were, and are, "intrusted" to Bartholomew county, and for the preservation of such moneys, and the application thereof to such use according to law, the county must be held liable.

In the early case of *State v. Springfield Tp., etc.*, 6 Ind. 83, it was held by this court, after a careful and exhaustive examination of the question, that the General Assembly of this State had no power to divert the congressional township fund, derived from the sale of the sixteenth section, in the several congressional townships, or the income from such fund, from the use of schools for "the inhabitants of such townships" respectively, to the use of the common school system of the State at large. The doctrine of the case cited has never since been doubted or questioned, but the correctness of such doctrine is recognized and acted upon by all the departments of our State government, legislative, executive and judicial. Sections 4328, *et seq.*, R. S. 1881; *Quick v. White-Water Tp.*, 7 Ind. 570; *Quick v. Springfield Tp.*, 7 Ind. 636; *Davis v. State, ex rel., supra.*

But if it be true, as surely it is, that the Legislature has no power to divert the congressional township fund, or the income therefrom, from the uses or purposes to which they are inviolably appropriated by our State Constitution, it can not be claimed that the board of commissioners of Bartholomew county could appropriate, directly or indirectly, any part of the moneys collected on the judgment against Davis and others to the payment of the fees of its attorneys for their services in procuring such judgment, and escape liability for the amount so appropriated. The entire amount collected on that judgment, whether paid to the attorneys of the county board or paid into the county treasury, was intrusted to the county within the meaning of section 6 of arti-

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cle 8 of our Constitution, and for that amount the Constitution declares the county "shall be held liable."

In the case in hand, judgment was rendered against the appellant, the board of commissioners, for the amount received by its attorneys from trustee Davis, and applied by such attorneys, with appellant's consent and approval, to the payment of their fees in the aforesaid suit against Davis and the sureties in his official bond, as township trustee. This judgment was rendered against appellant because the payment to its attorneys was a payment to appellant, and as the money applied to such payment was income from lands belonging to the congressional township fund, and, as such, was inviolably appropriated for the use of schools for the inhabitants of such congressional township, and was intrusted to appellant to be applied to such use, it could not be diverted lawfully from such use to the payment of attorney's fees. It behooves the appellant, therefore, to pay the entire amount of the judgment in the case under consideration, and the interest thereon, into the county treasury of Bartholomew county for the use of schools for the inhabitants of congressional township 8 north, of range 6 east. No part of such amount can be applied lawfully to the payment of fees and commissions to the attorney general or to his associate counsel; but the whole amount is inviolably appropriated and must be applied, under our Constitution and laws, to the use of schools for the inhabitants of said congressional township 8.

We are of opinion that the facts stated by appellant, in the first paragraph of its special answer herein, the substance of which we have heretofore given, are wholly insufficient to constitute a valid defence to the State's cause of action, as set forth in its complaint, and that the demurrer to such paragraph of answer was correctly sustained.

In each of the second and third paragraphs of its special answer herein, appellant pleaded substantially the same facts as in the first paragraph of such answer, with some changes in phraseology, and also of the order in which such facts

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were stated. The facts averred in the second and third paragraphs, like those in the first paragraph of such answer, were, that it became the duty of appellant under the law to bring and prosecute an action against the trustee of Sand Creek township and his sureties for the recovery of large sums of money received by such trustee as rents of the school section of land, situate in such township, which sums he failed to account for and pay into the county treasury as required by law; that in the discharge of such duty it was necessary that appellant should, as it did, employ attorneys to bring and prosecute such action; that the reasonable fees of such attorneys were a proper charge against the moneys sued for when collected, and that such attorneys, as they lawfully might, retained and withheld of the moneys collected in that action, in payment of their fees for their services therein, the sum of money which the State seeks to recover of and from the appellant in this suit.

It will be observed that, in each of the first three paragraphs of such answer, the compact between the Government of the United States and the people of Indiana territory, in convention assembled, whereby "the section numbered sixteen in every township" was "granted to the inhabitants of such township for the use of schools," is entirely ignored. Under that compact, the sixteenth section in every township, and the proceeds thereof when sold, constitute the congressional township fund, and the income thereof, whether interest on money or rents of such lands, is inviolably appropriated by and under the Constitution and laws of this State to the use and support of schools for the inhabitants of said congressional township, and to no other use or purpose whatsoever. The board of commissioners of Bartholomew county had no power, directly or indirectly, to divert any part of such income from the use and support of such schools to the payment of the fees of its attorneys. The congressional township fund is one of the trust funds referred to in section 7 of article 8 of the State Constitution of 1851 (section 188,

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R. S. 1881, which section reads as follows: "All trust funds held by the State shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created." *State v. Springfield Tp., supra; Davis v. State, ex rel., supra.*

The demurrers to the second and third paragraphs of such special answer were correctly sustained.

In the fourth paragraph of its special answer the appellant averred that the judgment described in the complaint herein was for the rents and profits accruing on school section 16, township 8 north, of range 6 east, in Bartholomew county, which had been collected by Joel S. Davis, trustee of Sand Creek township, and for which he failed to account with the county board, and pay the money into the county treasury; that such section 16, known as the school section, and the congressional township of which such section was a part, were situate within Sand Creek civil township, in said county, and the trustee of said civil township had, for sixty-five years last past, held, possessed and managed said section 16; that, at the June term, 1880, of the board of commissioners of such county, one Calder Newsom, then trustee of Sand Creek township, filed with such county board, on behalf of said township, a claim for the same \$2,000 in controversy in this action, wherein he asked the county board to pay said sum of \$2,000 into the county treasury to the credit of school revenue for tuition for the inhabitants of congressional township 8 north, of range 6 east, etc.; that, upon due consideration, said board of commissioners disallowed and rejected said claim, and rendered judgment thereon against said trustee, and that such judgment has never been annulled nor appealed from, but is in full force. Wherefore, etc.

It needs no argument, we think, to show that the facts stated by appellant in the fourth paragraph of its special answer are wholly insufficient to constitute a good plea of former adjudication in bar of the State's cause of action set forth in the complaint herein. The parties to the two pro-

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ceedings were as widely different as were the objects and purposes thereof respectively.

In the proceeding described in the fourth paragraph of the answer, the township trustee simply requested appellant to do what it ought to have done without such request, but which the trustee, as such, had no legal right to require it to do. When the board of commissioners denied the prayer of the trustee's petition, he could go no farther, because, as such township trustee, he had no legal title to or claim upon the sum of money mentioned in his petition, until after such sum had been paid into the county treasury and been apportioned by the county auditor to Sand Creek township.

On the other hand, the State prosecuted the pending action to secure the preservation of a portion of one of the trust funds held by the State, the management of which fund the State had intrusted to the board of commissioners of Bartholomew county, and to compel such board to make good and properly apply so much of the income from such trust fund, as the board had consented to the diversion of from the use and purpose to which such income was inviolably appropriated by the Constitution and laws of the State, to the payment of the fees of the board's attorneys in the prosecution of its aforesaid suit against Joel S. Davis and others. In the very nature of things, the refusal of the county board to grant said petition of the township trustee can constitute no valid defence in bar of the State's pending action. *Moore v. State, ex rel.*, 114 Ind. 414 (421), and the cases there cited.

The theory of the fifth paragraph of answer is that appellant was liable for interest on the sum of money it suffered to be diverted as aforesaid, only from the date the payment of such money into the county treasury was demanded of appellant. As applied to this action, this theory was wrong. Appellant was chargeable with interest from the date of such diversion.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed Dec. 19, 1888.

Montgomery v. Wasem et al.

No. 13,619.

MONTGOMERY v. WASEM ET AL.

DRAINAGE.—Assessment.—Injunction.—In order that a suit to enjoin the collection of a drainage assessment may be maintained, it is not enough that the proceedings for the establishment of the drain may be irregular and voidable, but it must be made to appear that they are absolutely void.

SAME.—Notice.—Collateral Attack.—A notice by publication, given under section 2 of the drainage act of 1875 (1 R. S. 1876, p. 428), although not exactly as the statute prescribes, yet affording some notice to the persons interested, will be deemed sufficient as against a collateral attack upon the judgment.

SAME.—Presumption as to Notice.—Where there is an entry in the proceedings before the county commissioners in effect reciting that all the notices required by the statute had been given, it will be assumed, in the absence of a showing to the contrary, that the statute was fully complied with.

SAME.—Injunction.—Acquiescence.—Estoppel.—A land-owner who stood by, with full knowledge and without objection, while a contractor expended his money in the construction of ditch allotments let to him in a proceeding instituted under the drainage act of 1875, can not, after the completion of the work and after the amount due therefor has been placed on the tax duplicate for collection, avail himself of a mere irregularity to enjoin the collection of the assessment.

SAME.—Act of 1875.—County Commissioners.—Right to Accept Work at Called Session.—Under section 12 of the act of 1875, the county commissioners had power to accept at a called session the work performed by a contractor, and the acceptance is conclusive, as against a suit for an injunction by a land-owner against whom an allotment was made, upon the question of the completion of the work.

SAME.—Injunction.—Tender.—Offer to do Equity.—An injunction to restrain the collection of an amount charged against land in favor of a contractor who performed work under the drainage act of 1875, which work was accepted by the proper officers as completed, will not lie where something is due the contractor, unless the money equitably due is tendered and brought into court, if the amount is known, or, if the amount is uncertain, an offer to do equity is made.

INJUNCTION.—Ministerial Officer.—A ministerial officer, who is lawfully engaged in executing an order made by a court having jurisdiction of the proceeding in which the order is made, can not be enjoined.

From the Posey Circuit Court.

116	343
116	375
116	537
117	3
120	591
121	892
123	437
116	343
126	410
126	402
126	170
116	343
130	583
116	343
131	424
132	252
116	343
134	552
116	343
137	491
138	138
116	343
147	156
116	343
152	96
116	343
154	240
116	343
162	486

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W. P. Edson, J. E. McCullough and J. H. Miller, for appellant.

A. P. Hovey and G. V. Menzies, for appellees.

ZOLLARS, J.—A drain was established by the board of commissioners of Posey county under the act of 1875. 1 R. S. 1876, p. 428. The allotments apportioned to the several land-owners along the line of the drain not having been worked by them, the work was let to appellee Virgil P. Bozeman. The work was accepted by the county board as completed, and the auditor issued to Bozeman a certificate for the sum due him, and entered the amount of the certificate upon the tax duplicate against the several tracts of land against which allotments of work were made by the viewers. The treasurer has the tax duplicate in his hands, and is threatening to collect the amount charged against lands owned by appellant. He instituted this suit against the treasurer, and Bozeman, the contractor, to obtain an injunction against the collection of the assessment or tax.

Of the objections to the proceedings discussed by appellant's counsel, that first in the natural order is, that no notice was given of the pendency or prayer of the petition for the establishment of the drain.

The suit is clearly a collateral assault upon the proceedings of the county board in the establishment and construction of the drain. In order that the suit may be maintained, it is not enough that those proceedings may be irregular and voidable. It must be made to appear that they are absolutely void.

Section 2 of the act above provides that after the filing of the report by the viewers the county auditor shall cause notice to be given by publication for four successive weeks in some newspaper, etc., and by posting three printed copies of said notice in three public places in the township where the proposed work is located, and one at the court-house in the county, of the pendency and prayer of the petition, and the

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time set for the hearing, which notice shall contain a pertinent description of the terminus of such proposed work, its direction and course from its source to its outlet, and the names of the owners of the lands that will be affected thereby, etc.

It is recited in the bill of exceptions that appellant read from the files a copy of a notice which was published in a newspaper, as follows:

"Notice is hereby given that the report of the viewers appointed at the June term, 1877, of the commissioners' court of Posey county, Indiana, to view a route for a ditch, as follows, to wit:" (here follows a description of the route of the ditch) "benefiting, according to the report of the viewers, the following named persons:" (here follow the names of the parties benefited according to the report), "has been filed by said viewers, and will be heard, determined and acted upon on the 5th day of December, 1877, it being the 3d day of the December term, 1877, of said court; parties interested will therefore take notice.

ALFRED D. OWEN,

"Auditor of Posey County."

It is contended that this notice is not sufficient, for the reason, as counsel say, that it is not a notice of the pendency and prayer of the petition, but of the pendency of the report of the viewers.

The words of the statute are that the auditor shall give notice of the pendency and prayer of the petition, and the time set for the hearing, but it is apparent that the report of the viewers is to be heard and passed upon at such hearing, and hence the notice must contain, amongst other things, the names of the owners of lands that will be affected by the work, and they can only be known by a reference to the report of the viewers. And so, the notice must contain a pertinent description of the terminus of such proposed work, its direction and course from its source to its outlet. That can only be ascertained with accuracy by a reference to the report of the viewers, because they may vary the location of

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the drain from that described in the petition. See section 21 of the act. At that hearing any person interested may file a remonstrance against the report. Section 5.

While the notice copied in the record is not exactly as the statute prescribes, it is evident that any person seeing it would readily understand therefrom that a petition for the construction of a drain is pending before the board. To say the least, the notice given was some notice.

Appellant read in evidence an entry from the record of the proceedings of the county board, made after the time set for the hearing of the petition and the report of the viewers, as follows:

“Which report having been publicly read, and no person objecting thereto, and the board having duly examined the same and the matters and things therein contained, and being satisfied that said ditch is necessary and will be conducive to the public health of those who reside on and near the same, and of public benefit and utility, and that the same had been duly advertised according to law, it is therefore ordered, adjudged and decreed by said court that said proposed ditch and public work be established to the same depth, width and length as specified by the report of the viewers as heretofore returned and filed herewith.”

Nothing further is shown as to whether or not the auditor gave notice by posting as the statute requires. The above entry, however, is a sufficient finding and showing that such a notice was given. In other words, it shows that, after an examination, the board was satisfied that all of the notices required by the statute had been given. Such being the case, we must assume that the posted notices were in all respects in compliance with the statute. There is no attempt at proof to the contrary.

When some notice is given, although defective, the orders of the board based upon such notice are invulnerable as against a collateral attack. It was the duty of the board, before proceeding in the case, to determine whether or not the

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proper notice had been given. It is well settled, that where the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle by its decision, such decision is conclusive as against a collateral attack. *Muncey v. Joest*, 74 Ind. 409; *Argo v. Barthand*, 80 Ind. 63; *Marshall v. Gill*, 77 Ind. 402; *Jackson v. State, etc.*, 104 Ind. 516, and cases there cited; *Forsythe v. Kreuter*, 100 Ind. 27; *Young v. Wells*, 97 Ind. 410; *McMullen v. State, etc.*, 105 Ind. 334; *Carr v. State, etc.*, 103 Ind. 548; *Updegraff v. Palmer*, 107 Ind. 181; *Deegan v. State, etc.*, 108 Ind. 155; *Carr v. Boone*, 108 Ind. 241; *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486; *Ricketts v. Spraker*, 77 Ind. 371; *Pickering v. State, etc.*, 106 Ind. 228; *Breitweiser v. Fuhrman*, 88 Ind. 28; *Heagy v. Black*, 90 Ind. 534.

It is further claimed by counsel for appellant, that the contract for the construction of the work, between the county auditor and Bozeman, was void for the reason that it was a single contract to construct the whole work allotted to thirty-nine different persons; in other words, that the work for the whole line of the drain was let to Bozeman by one contract.

Without deciding, it may be conceded, for the purpose of disposing of appellant's contention, that the statute, section 12 of the act, *supra*, contemplates a separate letting of the work allotted to each land-owner, and yet the letting of the whole was nothing more than an irregularity.

We are clearly of the opinion that the letting of the several allotments in one contract did not render the contract absolutely void. Appellant had full knowledge that the ditch was being constructed by Bozeman under the contract, and that he was expending his money in constructing it, and took no legal steps to stop the work or question the proceedings of the county board until this suit was commenced, several months after the work was accepted by the board as completed, and after the certificate by the auditor, as provided by section 12, *supra*, had been delivered to Bozeman, and the amount due him from the several land-owners had

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been placed upon the tax duplicate for collection. Having thus stood by, and in silence as to the contract, appellant can not now, in this collateral attack, overthrow the contract and thus escape payment. *City of Lafayette v. Fowler*, 34 Ind. 140; *Muncey v. Joest*, *supra*; *Hellenkamp v. City of Lafayette*, 30 Ind. 192; *Peters v. Griffie*, 108 Ind. 121; *City of Logansport v. Uhl*, 99 Ind. 531; *Flora v. Cline*, 89 Ind. 208; *Nevins, etc., Co. v. Alkire*, 36 Ind. 189; *Cauldwell v. Curry*, 93 Ind. 363.

We have examined the other objections urged to the contract, and, without further elaboration, have no hesitancy in holding that it is not void for uncertainty.

We come now to the question upon which appellant's counsel have thrown the weight of their argument, and that is, that the auditor had no authority, under section 12 of the act, *supra*, to issue to Bozeman a certificate, nor to place the amount of the same upon the tax duplicate, until after the work had been properly accepted; that the board of commissioners accepted the work at a called session, and that the work could not properly be accepted at the time it was, first, because it had not been completed in accordance with the contract, and second, because the board could not accept it at a called session. It is conceded that if the work had been accepted at a regular session of the board, that would have been conclusive, upon the question of its completion, against appellant, in a collateral attack, such as this suit is. But it is contended, in the first place, that the Legislature, in the enactment of the above statute, did not intend that the work might be accepted at a called session.

This contention is based upon the assumption that the acceptance of the work in such a case is a judicial act, which can not be performed so as to bind interested parties, such as the land-owners affected by the ditch are, without notice to them, and the supposed unreasonableness of requiring such parties to watch for and take notice of such called sessions; and, second, that the Legislature could not confer

authority upon the board of commissioners to accept such work at a called session, without additional notice to such interested persons of the time of such called session, and the contemplated acceptance of the work.

It will not be necessary for us to decide all of the questions discussed by counsel, as we have concluded that the judgment must be affirmed on account of infirmities in appellant's case not heretofore noticed. This much, however, may be said, that, looking to the whole of the act, *supra*, we think that it can not be said that the Legislature did not intend that the work might not be accepted by the board of commissioners at a called session. It is provided in the 12th section of the act, that the work may be accepted from the contractor as completed, by the board of commissioners, "if in session," or by the county auditor in vacation. It can not be said with reason, that the Legislature, having enacted that the auditor might accept the work in vacation, intended that the board of commissioners might not do so at a called session.

It has been decided more than once that an acceptance of the work by the board of commissioners, or by the auditor, is conclusive that the work has been completed, as against a collateral attack by a suit for an injunction by a land-owner against whose land an allotment was made.

In the case of *Muncey v. Joest*, *supra*, one of the causes relied upon for an injunction against the collection of the amount charged against land in favor of the contractor who did the work under the above act was, that the contractor had not completed the ditch as laid out and established. In reference to that it was said: "By section 12 of the ditching law, the duty of determining whether the ditch has been constructed according to contract is expressly devolved upon the board of commissioners. It is well settled that, where a matter is submitted to an inferior tribunal for decision, courts can not, in actions for injunction, usurp the functions of such tribunal, nor can the judgment of such tribunal be col-

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laterally impeached upon the sole ground that there was a failure in the performance of a contract."

In the case of *Simonton v. Hays*, 88 Ind. 70, the land had been sold, and the action was to set aside the sale upon the ground, amongst other reasons, that the contractor did not properly perform the work, and that the drain, notwithstanding the fact that it was imperfectly made, was accepted by the auditor. Upon the ground thus urged, the court said: "So, the power to decide when the work was completed and to accept it was given by the statute to the commissioners or the auditor, the means of arriving at the conclusion not being prescribed. * * The auditor had authority to act; his action was not void. In consequence of the acknowledged failure of the land-owner to perform the work apportioned to her land, it was let to a contractor by the officer authorized to do so. The proper officer accepted the work as complete, issued a certificate for the amount stipulated in the contract, and placed that amount against the land chargeable therewith on the tax duplicate, and the amount was collected as taxes are collected, by the sale of the land.

"It is not necessary here to decide as to the extent of the rights of the purchaser at the tax sale. * * * But the land-owner, without showing that she has paid anything for the work done on her land, or offering to pay anything, or showing that the land was sold without authority, seeks in a collateral way, by a suit in equity, to question the decision of a competent authority, on the ground that the work was not done according to the contract. That this question can not be collaterally raised, was decided in *Muncey v. Joest*, 74 Ind. 409, 414."

The case of *Cauldwell v. Curry*, *supra*, was an application for an injunction restraining the collection of a ditch assessment. It was said: "Where some part of a tax or assessment is due, no suit for injunction can be maintained without a tender of that part which is due." *Muncey v. Joest*, *supra*; *Stilz v. City of Indianapolis*, 81 Ind. 582; *Simonton*

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v. *Hays, supra.* To the same effect, see *Baker v. Clem*, 102 Ind. 109, 114.

These cases, and others like them that might be cited, are grounded, in part, upon the well established equitable rule that he who asks equity must do equity.

In the case before us, neither appellant nor the person from whom he purchased the land did the work allotted to it. Bozeman, the contractor, did work and expended his money in the construction of the ditch. That is conceded in the complaint, and shown by the evidence. Upon appellant's showing, something is due Bozeman on account of the work and money expended by him, but appellant has neither tendered any amount, nor in any way offered to pay any amount that may be found due from him to Bozeman. Upon the authority of the above cited cases, without such tender or offer, he can not upon the facts in the case maintain a suit for an injunction against the collection of the amount charged against him. Having reached this conclusion, it is not necessary for us to decide what remedy he may have if the ditch was in fact not completed according to the contract, nor whether or not he has any remedy.

The judgment of the court below, being in accord with this opinion, is affirmed, with costs.

Filed Feb. 18, 1888.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—In so far as the appellant's complaint challenges the sufficiency of the notice it is unquestionably a collateral attack, and as there is some notice, and that notice has been adjudged sufficient by the tribunal invested in the first instance with the authority of determining jurisdictional facts, the attack is unavailing. This has been the steady ruling of this court since the case of *Evansville, etc., R. Co. v. City of Evansville*, 15 Ind. 395. In addition to the many cases cited in our former opinion, we cite *Prezinger v. Harness*, 114 Ind. 491; *Adams v. Harrington*, 114

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Ind. 66; *Hackett v. State, etc.*, 113 Ind. 532; *Ely v. Board, etc.*, 112 Ind. 361; *Kleyla v. Haskett*, 112 Ind. 515; *Hume v. Conduitt*, 76 Ind. 598.

There was, we must conclude upon the strength of this long settled rule, authority to hear and determine the original case submitted to the court for judgment, and, of course, the judgment is invulnerable, no matter how many errors and irregularities may have intervened, as against a collateral attack.

Another consequence follows from the rule we have stated, and that is this: There was some authority for the proceedings of the commissioners and officers, and these proceedings were not wholly destitute of validity. The case is, therefore, very easily discriminated from one in which there is an entire absence of authority. If there had been no attempt to proceed under the law, or an utter want of jurisdiction, we should have before us a case of a different class, but there was an attempt to proceed under the law and there was jurisdiction.

It is said, in the very able brief on the petition for rehearing, that as there is no mode of attacking the acts of the auditor, it necessarily results that injunction will lie. But we think this proposition does not meet the point which obstructs the appellant's way to success. As we understand the record, the auditor did not perform an independent ministerial act, but simply executed, as it was his duty to do, the order of the commissioners' court. A ministerial officer, who is engaged in executing an order of court, and obeys the order, can not be enjoined, nor can an officer who does what the law commands be restrained by injunction. *Smith v. Myers*, 109 Ind. 1. To be sure, the order must be made in a case where there is jurisdiction, and the officer must do rightfully what it directs. Here there was a prior order which authorized the auditor to do the act of which appellant complains, and the only question is whether he so far disobeyed the law as to render void the entire assessment. It

may well be doubted whether, in any case, where a discretion is committed to an officer, his acts can be impeached without proving fraud or mistake. If the auditor erred in the mode of awarding the contract, or erred in determining that the work was completed, it may well be doubted whether such errors could be corrected by judicial intervention after the work was done, since official discretion is seldom controlled by the courts. *Davis v. Lake Shore, etc., R. W. Co.*, 114 Ind. 364; *Weaver v. Templin*, 113 Ind. 298; *Leeds v. City of Richmond*, 102 Ind. 372; *City of Kokomo v. Mahan*, 100 Ind. 242; *Anderson v. Baker*, 98 Ind. 587; *Ricketts v. Spraker*, 77 Ind. 371; *City of Fort Wayne v. Cody*, 43 Ind. 197; *Mayor, etc., v. Roberts*, 34 Ind. 471; *Smith v. Corporation of Washington*, 20 How. 135; *Davis v. Mayor*, 1 Duer, 451.

But we do not deem it necessary to decide how far the commissioners or the auditor were vested with discretionary powers, for we think it enough to affirm that there was jurisdiction in the original proceedings, that there was authority of law to execute the original judgment, and that the officers assumed to proceed under the original judgment and subsequent order. Having affirmed these facts to exist, we come to the controlling question, and that is this: Can the land-owner, after the completion of the work, escape payment of the benefits without tendering, or offering to tender, the amount which in equity the contractor should receive? It is settled in analogous cases, that where a tax has been levied, although the officers have not done their duty, the amount admitted to be owing must be tendered and brought into court; but if the amount can not be ascertained, and that fact is sufficiently pleaded, there may be an offer to do equity. This offer, however, will not be sufficient unless it clearly appears that no tender can be fully made, for where a tender can be made it must be a legal tender, with all its incidents. *Morrison v. Jacoby*, 114 Ind. 84. In this case

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we have, as fully as in any of the cases cited in the original opinion, the foundation for a valid and enforceable assessment, and there is no conceivable reason why the plaintiff, who seeks to avoid payment of the lien, should not have the same rule applied to him as in other assessment cases. The cases do apply that rule, and, as we are well satisfied, do rightly apply it to drainage assessments. *Prezinger v. Ford- ing*, 114 Ind. 599; *Prezinger v. Harness*, 114 Ind. 491.

But we have in this case another element of controlling importance, and that is the fact that the appellant, with notice of the work, suffered it to go on to completion without objection. As we have said, there was jurisdiction, and an assumption of authority under the law, and this failure of the appellant to object operates as an estoppel. This question was presented in a drainage case, that of *Peters v. Grij- fee*, 108 Ind. 121, much as it is here, and it was held that the land-owner was estopped. Many authorities are there cited, and the later case of *Prezinger v. Harness*, *supra*, fol- lows and applies the rule there laid down. In the earlier case of *Flora v. Cline*, 89 Ind. 208, the rule was applied in a drainage case. In *Taber v. Ferguson*, 109 Ind. 227, and in *City of Logansport v. Uhl*, 99 Ind. 531, authorities are collected and examined, and the same general rule declared and enforced. In *Ross v. Stackhouse*, 114 Ind. 200, the ques- tion was again considered and decided, and in *Davis v. Lake Shore, etc., R. W. Co.*, *supra*, the rule was declared to be established and to be applicable to cases in principle the same as the one under examination.

As decided in the *Indianapolis, etc., R. W. Co. v. State, ex rel.*, 105 Ind. 37, and *Hackett v. State, etc.*, 113 Ind. 532, the original order still remained and was not vitiated by the errors and irregularities in the subsequent proceedings, so that there was a sufficient foundation for the proceedings, and, as the work was done under them, the presumption, in the absence of countervailing facts, must be that some benefit

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accrued to the land-owners. This is the theory upon which the decision in *Baker v. Clem*, 102 Ind. 109, proceeds, and we have no doubt that it is the true one.

The fact that a judgment was entered directing that a ditch be constructed and that assessments be levied, implies, in itself, that the land-owners would be benefited by its construction. The right of the commissioners to make the order for the assessment depends upon the benefit to land-owners, and it must be presumed that these sworn officers did their duty, and from this presumption results the conclusion that appellant's land was benefited. This presumption makes a *prima facie* case, and a *prima facie* case stands until overthrown. *Louisville, etc., R. W. Co. v. Thompson*, 107 Ind. 442; *Bates v. Prickett*, 5 Ind. 22.

It is important to keep in view the fact that title to land is not in question in such cases as this, and that the ultimate question is, shall the assessment be paid? If title passed without sale immediately upon the completion of the assessment, it could be much more forcibly insisted that it would be proper to apply the old rule that some of the courts enforce in cases of tax titles; but, in such a case as the one before us, title does not pass until after sale at public outcry, or, at least, until after public notice, so that the question is not whether the contractor shall take title at once, for the question is whether he shall recover compensation for his work. It is evident, therefore, that the controlling rule we lay down here, and have laid down in other cases is, that a land-owner may, by standing by in silence, estop himself from repudiating the assessment, not that he may estop himself from defending his title. Before the question of title comes in issue other steps must be taken, but even in cases where title does come in issue it is no more than just that he who asks equity should do equity by paying the man who has done the work the value represented by the benefit which the owner's land receives. After all, whether title be in issue or not, the

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simple question is whether the land-owner, who stands by, shall be estopped from avoiding tender or payment of compensation.

Petition overruled.

Filed Dec. 20, 1888.

116	356
117	400
119	79
119	223
116	356
126	336
116	356
154	222
116	356
168	375

No. 13,421.

THE INDIANAPOLIS AND VINCENNES RAILROAD COMPANY
ET AL. v. REYNOLDS.

RAILROAD.—Right of Way.—Width.—Ambiguous Contract.—Parol Explanatory Evidence.—What shall constitute a right of way for a railroad is not defined by law, but, like any other easement, it is a subject of contract, and when the contract, as to the width of the right of way, is general or ambiguous, the intention of the parties may be shown by parol evidence of their contemporaneous acts and declarations.

SAME.—Release.—Indefinite Right of Way.—Intention of Parties.—Evidence.—Ejectment.—Where a land-owner executes a release to a railroad company for a right of way in general terms, the width not being given, and the railroad company takes possession of, fences and constructs its road upon a strip forty feet wide, and occupies the same for eighteen years, when it sets its fences out so as to include one hundred feet, the land-owner, in an action by him to recover the added sixty feet, may show by parol that the right of way released consisted merely of the forty feet originally occupied by the company.

From the Marion Superior Court.

S. O. Pickens, for appellants.

J. S. Duncan, C. W. Smith and J. R. Wilson, for appellee.

MITCHELL, J.—The decision in this case depends almost entirely upon the construction of a written instrument, pur-

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porting to be a release of a right of way over certain lands, executed by Jesse A. Reynolds to the Indianapolis and Vincennes Railroad Company.

The question to be decided is presented in various forms by the record. It appears that in the year 1867, the railroad company, having surveyed and being about to locate and construct its road, was desirous of procuring a right of way over certain lands owned by Reynolds. Having made a number of ineffectual attempts to agree upon the amount of compensation to be paid, a written agreement was afterwards entered into by the parties concerned, in which they bound themselves to abide the decision of arbitrators mutually chosen, as to the amount to be paid for a right of way over the lands above mentioned.

The arbitrators assessed the damages at \$500, which sum was paid by the railroad company to Reynolds, who thereupon executed the release in question. It was recited therein that in consideration of the above mentioned sum, and of the advantages that might result from the construction of the railroad as then surveyed, or as it might be finally located, the releaser did "forever quitclaim to the Indianapolis and Vincennes Railroad Company the right of way for so much of said railroad as may pass through the following described piece, parcel or lot of land in the county of Marion," etc.

Both in the agreement to arbitrate and in the release the phrase "right of way" was employed without any further description, and without defining the width of the strip of ground granted to or to be occupied by the company. Immediately after paying the money and receiving the release, the railroad company took possession of a piece of land forty feet wide across Reynolds' farm, located and constructed its railroad thereon, and fenced the same on either side. The company occupied and used the land thus fenced for its right of way for a period of eighteen years, and until 1885, when, claiming that because the release defined no particular width it conveyed a strip of ground six rods wide, the company

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proceeded to set its fences out on each side so as to include one hundred feet in width across the farm.

This action was brought to recover possession of the sixty feet included by the fences as newly erected outside the forty feet originally enclosed.

For the railroad company it is contended that the legal effect of the release was to grant a right of way to the railroad company six rods in width, and that the court erred in permitting the plaintiff to aver and prove that the right of way released to the railroad company, and for which it paid, was the forty feet originally occupied and fenced by the defendant company.

The position contended for is not maintainable. Conceding that the instrument in question is valid as a grant of an easement, it is nevertheless certain that it was only effectual to vest in the railroad company the right to select and locate a right of way over the plaintiff's farm to be occupied and used in pursuance of its general purpose to construct and operate a railroad. *Burrow v. Terre Haute, etc., R. R. Co.*, 107 Ind. 432.

The writing is general, indefinite and ambiguous, both in respect to the place where the plaintiff's farm was to be crossed, and the width of the strip of land to be occupied for a right of way. Before an actual entry upon and occupation of a right of way by the railroad company, the agreement would only have been enforceable by the aid of extrinsic evidence, showing the contemporaneous acts and intention of the parties, and thus defining and limiting the easement granted. Thus, in *French v. Hayes*, 43 N. H. 30, the court, expressing the general rule, said: "Where any doubt arises as to the meaning of any written instrument, as for example a contract, deed, or will, the court endeavors to put itself in the place of the parties, by receiving evidence of the surrounding circumstances. * * If the description of any person, or thing, or circumstance, is true in part, but not true in every particular, parol evidence is admissible of

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any extrinsic circumstances tending to show what person or persons, or what things were intended, or to ascertain the meaning in any other respect." Or, as was said by this court in *Torr v. Torr*, 20 Ind. 118: "Where the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic, parol evidence, provided a new description is not introduced into the body of the contract." *Skinner v. Harrison Tp.*, *ante*, p. 139; *Roehl v. Haumesser*, 114 Ind. 311, and cases cited; *Keller v. Webb*, 125 Mass. 88; *Miller v. Stevens*, 100 Mass. 518.

The grant in question was of an easement, or "right of way," across the grantor's land. In a general sense the phrase employed is sufficiently free from ambiguity, but inasmuch as a railroad company is empowered to lay out its road not exceeding six rods wide, the expression is ambiguous in the absence of further definition.

The intention of the parties in respect to the width of the right of way does not appear on the face of the writing, and it was hence competent to remove the ambiguity by admitting parol evidence of their contemporaneous acts and negotiations, so as to apply the contract to the subject-matter, and ascertain their intention as regards the particular right of way mentioned. This was not in violation of the well settled rule which forbids that a plain and unambiguous contract be varied, added to or contradicted by parol. *Singer Manf'g Co. v. Forsyth*, 108 Ind. 334, and cases cited.

The right of way having been granted without fixed or defined limits, there was no other way of arriving at the intention of the parties except to resort to their acts and declarations preliminary to, and while they were engaged in making the actual location of the undefined right of way.

Thus, in *Jennison v. Walker*, 11 Gray, 423, BIGELOW, J., speaking of the principle which rules this case, said: "Where an easement in land is granted in general terms, without giving definite location and description to it, so that the part of the land over which the right is to be exercised can not be

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definitely ascertained, the grantee does not thereby acquire a right to use the servient estate without limitation as to the place or mode in which the easement is to be enjoyed. When the right granted has been once exercised in a fixed and defined course, with the full acquiescence and consent of both parties, it can not be changed at the pleasure of the grantee." "This rule," said the same learned judge, "rests on the principle that where the terms of a grant are general or indefinite, so that its construction is uncertain and ambiguous, the acts of the parties, contemporaneous with the grant, giving a practical construction to it, shall be deemed to be a just exposition of the intent of the parties." *Onthank v. Lake Shore, etc., R. R. Co.*, 71 N. Y. 194; *Wynkoop v. Burger*, 12 Johns. 222; *Bannon v. Angier*, 2 Allen, 128.

There would be force in the argument by which counsel seeks to maintain that, in the absence of a defined width, it must be conclusively presumed that a right of way six rods wide was intended, if the statute required that a railroad company should always and in every instance lay out its road the width above specified. A legal presumption would then arise that by the grant of a "right of way" it was intended to grant such a one as the law defined, and the rule would apply which holds that words imported into a contract by law are as unassailable by parol as if they had been written in by the parties. *Snow v. Indiana, etc., R. W. Co.*, 109 Ind. 422; *Smythe v. Scott*, 106 Ind. 245.

But the law does not define what shall constitute a right of way, nor has the phrase "right of way," as to its extent, any fixed legal meaning. The width of a right of way for a railroad, like any other easement, is, therefore, a subject of contract, and, when the contract is general or ambiguous, the intention of the parties must be ascertained in the manner already indicated. It was therefore proper to aver and prove the contemporaneous acts and declarations of the parties.

It is claimed that *Indianapolis, etc., R. W. Co. v. Rayl*, 69 Ind. 424, *Prather v. Western Union Tel. Co.*, 89 Ind. 501,

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and *Campbell v. Indianapolis, etc., R. R. Co.*, 110 Ind. 490, support the contention of the appellant in the present case. We entertain a different view of these decisions. They decide, in effect, that where a railroad company enters upon land and takes possession of, and occupies a right of way of the full width authorized by law, or by its charter, no limitation upon its right to do so appearing, it will be conclusively presumed that it appropriated the lands so occupied or taken possession of to the full width allowed by law. This is the correct doctrine, and is in accord with our holding in the present case.

There was no error in admitting evidence to show that the railroad company contracted for and occupied a right of way forty feet in width on either side of the plaintiff's farm.

The judgment is affirmed, with costs.

Filed Dec. 15, 1888.

No. 13,317.

118 361
10187 44

THE WESTERN UNION TELEGRAPH COMPANY v. JONES.

TELEGRAPH COMPANY.—Negligence.—Penalty.—Under the act of 1885 a telegraph company is not liable for the penalty prescribed therein where the only wrong proved is a negligent one.

SAME.—Special Finding.—Presumption.—In an action to recover a penalty imposed by law, it can not be presumed, in aid of a special finding, that the defendant violated the law; the presumption is that the law was obeyed.

From the Bartholomew Circuit Court.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.

G. W. Cooper and C. B. Cooper, for appellee.

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ELLIOTT, J.—The facts stated by the court and the conclusions of law drawn by it, very clearly show that the appellant was held liable for the statutory penalty because it negligently failed to deliver a telegram sent by the appellee to Samuel Jones. There is no finding of bad faith or partiality, and none can be presumed.

It is quite clear that, in an action to recover a penalty imposed by law, it can not be presumed, in aid of a special finding, that the defendant violated the law; on the contrary, the presumption is that the law was obeyed and the statutory duty performed. The case must, therefore, be regarded as one of negligence only, and the question is whether, under the act of 1885, a telegraph company can be made to pay the penalty prescribed by that act where the only wrong proved is a negligent one. This question is settled against the appellee by the decisions of this court. *Western U. Tel. Co. v. Swain*, 109 Ind. 405; *Western U. Tel. Co. v. Steele*, 108 Ind. 163.

It is to be remembered that the right to a penalty is purely a statutory one, and a penalty is only recoverable in the cases prescribed by the statute. It is also to be remembered that a penal statute can not be extended by construction. It follows, therefore, that unless a statute clearly gives the right to a penalty none exists. As the act of 1885 does not prescribe a penalty for a negligent breach of duty, no penalty can be recovered. We are not, it may not be improper to remark, dealing with a claim for damages, but with a claim to a statutory penalty.

Judgment reversed.

Filed Nov. 15, 1888.

Fitzmaurice v. Mosier.

116	365
184	473

No. 13,093.

FITZMAURICE v. MOSIER.

PROMISSORY NOTE.—Payment.—Cancellation.—Power of Court to Decree.—

Where the maker of a promissory note has fully paid the same, but the payee refuses to surrender it, and keeps it in his possession, claiming still to own it, the maker may maintain a suit in equity for its cancellation, notwithstanding he has a complete defence at law.

SAME.—Note Executed by Mistake.—Where a promissory note was executed by the maker in the belief that it was in payment of a debt due the payee, which belief was created by the representations of the latter or his attorney, whereas the debt was not that of the maker, but of a different person, a court of equity will decree the cancellation of the note.

From the Randolph Circuit Court.

W. A. Thompson, A. O. Marsh and J. W. Thompson, for appellant.

A. J. Stakebake, for appellee.

NIBLACK, J.—Complaint by Christian Mosier against William Fitzmaurice, in two paragraphs. The first paragraph averred that the plaintiff, on the 3d day of January, 1882, executed to the defendant his promissory note for the sum of \$34.86, payable fifteen days after date, without relief from valuation laws; that the plaintiff afterwards, and during the year 1882, fully paid the debt of which such note afforded the evidence, but that the note was not delivered up to the plaintiff at the time it was paid; that the plaintiff had, divers times since the note was so paid, demanded of the defendant that it be surrendered for cancellation, but that the defendant had refused to so surrender the note, of which he was still in the possession, and which he still claimed to own.

The second paragraph alleged that, on the 3d day of January, 1882, the defendant made out an itemized account against one Christian Mosier and brother, for the sum of

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\$34.86, and placed the same in the hands of one Lewis, an attorney at law, for collection; that the plaintiff was not the Christian Mosier named in said account, nor was he in any way liable to pay such account, or the debt represented by it; that the plaintiff was, at the same time, indebted to the defendant in an account, but in another and a different one from that left in the hands of Lewis for collection as above stated; that the said Lewis, who was the attorney for the defendant, and who acted for him, and at his instance, represented to the plaintiff that he had his, the plaintiff's, account also in his hands for collection or settlement; that the plaintiff, relying on said representation, and believing the same to be true and that he was settling his own account, executed to the defendant, and delivered to the said Lewis, the promissory note described in the first paragraph hereof; that said note was, in the manner stated, executed by mistake and without any consideration whatever; that it was not given for the benefit of the said Christian Mosier and brother, nor to secure the debt owed by them; that the defendant was then the holder and in the possession of said note, claiming to be the owner thereof; that the plaintiff had frequently demanded the surrender and cancellation of said note, but that defendant had refused to surrender the same and to permit the cancellation thereof; that the defendant had threatened to negotiate the note to innocent parties and to cause suit to be instituted thereon. Wherefore the plaintiff prayed that the note might be required to be surrendered and cancelled, and that the defendant might be perpetually enjoined from either negotiating or instituting suit upon said note.

Separate demurrers were overruled to both paragraphs of the complaint, and after issue joined and a hearing, the circuit court made a finding for the plaintiff and decreed accordingly. Error is assigned upon the overruling of the demurrers to both paragraphs of the complaint.

It is claimed that, upon facts stated in the first paragraph

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of the complaint, Mosier had a complete defence at law against the note alleged to have been paid, and that, consequently, the refusal of Fitzmaurice to surrender the note afforded no ground for the equitable relief demanded, and authorities are cited in support of the doctrine thus contended for.

The American doctrine on the subject of equitable jurisdiction restricts courts of equity, as a general rule, to narrower limits than does the English doctrine on that subject. This has resulted partly from the tendency of legislation in that direction, and partly from the construction given to our constitutional guarantees relating to the right of trial by a jury. With us the generally accepted doctrine is, that the exclusive jurisdiction to grant equitable relief, such as cancellation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case, where the legal remedy, either affirmative or defensive, which the injured or defrauded party might obtain, would be adequate, certain and complete.

It is not enough, however, that there is a legal remedy. To exclude the equitable jurisdiction, the legal remedy must meet all the requirements of justice, and be, in all respects, as satisfactory as the relief furnished by a court of equity. Latterly the tendency has been towards a relaxation of the American doctrine as stated, and particularly so in the States which have adopted codes of civil procedure, sometimes denominated the Code States.

In Pomeroy's Equity Jurisprudence, one of our most modern as well as most approved works on the subject to which it relates, it is said, at section 1377, that "A doubt was formerly entertained as to whether a court of equity ought to exercise its jurisdiction to order instruments absolutely void at law, and not merely voidable, to be delivered up and cancelled, since the legal remedy of a party was adequate and complete, and no case was presented for equitable interference; but it is now well settled that jurisdiction will

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be exercised in such cases, except where the invalidity of the instrument is apparent on its face." See, also, *Pomeroy*, *supra*, sections 297, 914.

Our cases are in entire accord with the modern rule thus announced by *Pomeroy*, and some of them have, perhaps, advanced upon it to some extent in its application to certain classes of instruments, which, though void on their face, constitute nevertheless a cause of irritation, annoyance or embarrassment so long as they are permitted to remain in the hands of the adverse party.

In the recent case of *Otis v. Gregory*, 111 Ind. 504, this court said: "Whatever may have been formerly held in other jurisdictions in respect to the cancellation of void contracts, the doctrine that a party to an instrument, which is of no legal force or validity whatever, may ask the aid of a court of equity in procuring its surrender and cancellation, is now fully set at rest here. It is regarded as against conscience, that one party should persist in holding a deed or other instrument against another of which he can make no possible use except as a means of embarrassing his adversary." This statement as to the limit to which equitable jurisdiction extends in this State, is, as we believe, well supported by the weight of modern authority, and rests upon sound principles of remedial justice. On the same general subject, see, also, the cases of *Bishop v. Moorman*, 98 Ind. 1, and *Scobey v. Walker*, 114 Ind. 254.

According to the averments of the paragraph of complaint under consideration, Mosier had fully paid the note therein described, but Fitzmaurice had, upon demand, refused to surrender it for cancellation, and continued in possession of the note, claiming still to own it. This condition of affairs constituted an element of disturbance between the parties, and a standing menace as well as cause of embarrassment to Mosier, entitling him to immediate equitable relief. To have required Mosier, under such circumstances, to await the pleasure of Fitzmaurice, or his executor, administrator or

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assignee, in bringing suit on the note might have resulted injuriously to his interests. The lapse of time often makes it more difficult to prove an affirmative defence.

Courts of equity have, in an especial manner, jurisdiction of all matters involving fraud, mistake or accident. The second paragraph of the complaint before us sought relief from the consequences of a mistake made in the execution of a promissory note, and made what appears to us to have been a good *prima facie* case in that respect.

The judgment is affirmed, with costs.

Filed March 24, 1888.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—There is much reason for extending the equity powers of the court where, as with us, there are no separate tribunals, but the rules of law and equity are administered by the same court. There is no good reason why a court should not exercise its equity power to direct the cancellation of a promissory note that justice requires should not be enforced. We can perceive no reason why a court may not decree the cancellation of a note which is shown to be entirely without validity and to have been wrongfully procured. We think the second paragraph of the complaint states a case in which justice will be subserved by decreeing the cancellation of the promissory note of the plaintiff in the hands of the defendant. That paragraph shows that the note in question was executed by the plaintiff in the belief that it was in payment of a debt due the defendant, that this belief was created by the representations of the latter, and that the representations were untrue, inasmuch as the debt was not that of the plaintiff, but of a different person. By means of the untruthful representations the defendant secured the promissory note of the plaintiff for an entirely different purpose from that for which he intended to execute it, and for which he believed he was executing it. We can not

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agree with appellant's counsel that the pleading simply shows a case of failure of consideration or of payment; on the contrary, we are satisfied that it shows (not as definitely and clearly as it might be desired, it must be said), that by false representations the defendant induced the plaintiff to execute a promissory note for a purpose entirely different from that for which he believed he was executing it. If, however, we take the more favorable view to the appellant and hold that the note was executed by mistake, we must decide the case against him, for, even on this theory, we should be compelled to hold that there was a material mistake of fact brought about by the false statements of the appellant, and that a note executed because of such a mistake can not be enforced. *Parrish v. Thurston*, 87 Ind. 437.

Where the defendant knows that the plaintiff believes he is contracting about a different subject from that actually dealt with, it is a fraud on the defendant's part to remain silent and reap an advantage from the silence. Of course, if the defendant has no knowledge of the belief of the plaintiff it is otherwise; here, however, the defendant not only knew of the plaintiff's belief, but he, by positive statements, created that belief.

The pleading is a clumsy one, and it is not without hesitation that we give it the construction we have done. We think, however, that as it shows that the defendant's agent, who conducted the transaction, had not in his hands, as represented, the bill against the appellee, and for which, relying on the agent's representations, the note was executed, it is justly inferable that the note was executed for a debt different from that for which the appellee intended to execute it and for which he believed he was executing it.

Petition overruled.

Filed Dec. 20, 1888.

The Board of Commissioners of Posey County v. Templeton.

No. 13,448.

THE BOARD OF COMMISSIONERS OF POSEY COUNTY v.
TEMPLETON.

TOWNSHIP TRUSTEE.—*Compensation.*—*Overseer of Poor.*—A township trustee, who has been paid two dollars per day for his services out of the township fund, is not entitled to an additional compensation, for the same time, as overseer of the poor.

From the Posey Circuit Court.

E. M. Spencer, J. Kilroy and W. Loudon, for appellant.

A. P. Hovey and G. V. Menzies, for appellee.

ELLIOTT, J.—The appellee filed a claim for \$600 for services rendered as overseer of the poor from the 19th day of April, 1884, until the 15th day of April, 1886.

The appellant answered that the appellee was the duly elected and qualified township trustee, that all of the alleged services were rendered by him in his official capacity of trustee, and that before the commencement of this action he was allowed and paid out of the township fund two dollars per day for each and every day for which in his complaint and itemized statement he claims compensation. This answer is good, and the trial court erred in sustaining the appellee's demurrer.

The question here presented is settled by the decision in *Board, etc., v. Bromley*, 108 Ind. 158, where it was said: "We further interpret the section under consideration to mean that, as applicable to both classes of service, an allowance of only two dollars can be made for an actual day's service, without reference to the manner in which the day may have been divided between the two classes of service, and that, consequently, a township trustee is not entitled to

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receive, out of any fund, more than two dollars for official services performed during any one day."

This ruling is in harmony with the spirit of our statutes and our decisions, for their spirit is that compensation for official services can be recovered only in cases where it is clearly given by positive law.

Judgment reversed.

Filed Dec. 20, 1888.

116 370
124 218

118 370
180 899

No. 13,284.

THE AMERICAN CENTRAL INSURANCE COMPANY v.
SWEETSER ET AL.

INSURANCE.—Notice and Proofs of Loss.—Pleading.—In an action on a policy of insurance, a general averment that the plaintiff has performed all the conditions of the policy on his part, dispenses with particular averments that notice was given and proofs of loss furnished to the insurer. Section 370, R. S. 1881.

SAME.—When Notice and Proofs not Necessary.—After an insurance company has itself taken cognizance of a loss, and prepared such proofs as it deems essential to an adjustment, the insurer may assume, until notified to the contrary, that additional notice and proofs are not required.

SAME.—Agreement to Accept Less than Whole Debt.—Consideration.—Where the amount of a debt or liability is ascertained and uncontroverted, an agreement that the debtor may discharge his obligation by the payment of a sum less than the amount due, will not be enforced, unless it is supported by a new or independent consideration.

SAME.—Compromise.—In order that an executory contract growing out of a compromise may be enforced, there must have been an actual dispute founded upon a colorable right.

SAME.—Assignment.—Subsequent Contract Between Insurer and Insured.—The assignee of a policy of insurance is not bound by any agreement which the assignor may make with the insurance company, subsequent to the

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assignment, as to the amount which shall be accepted as a satisfaction of its liability.

From the Grant Circuit Court.

A. Steele and *R. T. St. John*, for appellant.

A. Steele and *J. A. Kersey*, for appellees.

MITCHELL, J.—This was a suit by James V. Sweetser and William Lyons, partners, doing business under the firm name of Sweetser, Lyons & Co., to recover on a certificate issued upon an open policy of fire insurance, executed by the American Central Insurance Company to Ernest Warneke, covering certain grain and seeds contained in a warehouse situate in the town of Odebolt, in the State of Iowa.

The property insured was consumed by an accidental fire on the 5th day of November, 1885, whereupon the certificate, which guaranteed indemnity against loss to the amount of \$1,500, was duly assigned to the plaintiffs.

It is averred in the complaint "that all matters and things required by said open policy have been in all things complied with;" that an authorized agent of the company had made an appraisement or adjustment of the loss, but that the company refused to pay the same, and so notified the plaintiffs.

It was not necessary, with these averments in the complaint, to aver more particularly that notice had been given and proofs of loss furnished to the company.

Section 370, R. S. 1881, dispenses with the necessity, so far as pleadings are concerned, of specially averring the performance of each and every condition precedent in a contract, and provides that it shall be sufficient to allege generally that the party performed all the conditions on his part. The averment as above set out is not expressed in the most apt phraseology, but it sufficiently expresses the idea that the insured or his assignees had performed all the conditions of the policy on their part. *National Benefit Association v. Bowman*, 110 Ind. 355, and cases cited.

Besides, since it appears by the complaint that an adjustment had been made by an agent duly empowered for that purpose, and that the company had afterwards notified the plaintiff that the loss would not be paid, it must be deemed that further notice and proof have been waived.

After an insurance company has itself taken cognizance of a loss, and prepared such proofs as it deems essential to an adjustment, the insured may assume, until notified to the contrary, that additional notice and proofs are not required. *Indiana Ins. Co. v. Capehart*, 108 Ind. 270; *Commercial Union Assurance Co. v. State, ex rel.*, 113 Ind. 331, and cases cited.

The defendant answered, admitting the issuance of the policy, and that the loss had occurred, and that it had been adjusted on the 11th day of November, 1885, and found to be \$994.25, as alleged in the complaint, but in exoneration of its liability, except as to the sum of \$596.55, it alleged that Warneke, after receiving the defendant's policy, had taken out other insurance on the property destroyed, which other insurance was in force when the loss occurred, and that the company which issued the last policy was liable to contribute to the loss.

It was further averred that at the time the proofs of loss were made, Warneke agreed with the defendant's adjuster that he would accept \$596.55 in full satisfaction of the liability of the company, which sum the defendant avers it has always been and still is ready to pay.

To this answer the plaintiffs replied, admitting the making of the proofs of loss, and the agreement by Warneke, as a part thereof, but they alleged that the latter had, prior to that time, as the defendant well knew, assigned the policy sued on to them.

They averred further that it was a part of the agreement between their assignor and the adjusters that if the plaintiffs, upon consultation with counsel, should ascertain that the defendant was liable for the whole loss, up to the amount stip-

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ulated in the policy, then the agreement to take a less sum was to be considered as at an end. This reply was held sufficient on demurrer, and of the ruling so holding the appellant now complains. Waiving the point urged against the form of the demurrer, our conclusion is that the court committed no error in its ruling in that connection.

The answer, it will be observed, is predicated upon an agreement made with Warneke, by which the latter agreed to accept the sum above named, in full satisfaction of the defendant's liability on its policy, after an ascertained loss amounting to \$994.25 had occurred. It does not appear that there was any dispute or question as to the liability of the company for the loss, or as to the amount for which it was liable, nor does it appear that the sum agreed upon was to be paid before it would have otherwise fallen due, or that there was any consideration whatever for the agreement to take the amount fixed upon by the adjuster and Warneke. If, therefore, the controversy were between the latter and the company, it might be a question whether or not the agreement relied on was supported by any consideration whatever. It may be that the sum agreed upon was in fact the proportion which the appellant company was liable to pay, in view of the subsequent insurance, but the pleadings involved are based upon the assumption that it was less, and that the agreement was binding.

Where the amount of a debt or liability is ascertained and uncontroverted, an agreement that the debtor may discharge his obligation by the payment of a sum less than the amount due, will not be enforced, unless it is supported by some new or independent consideration. *Laboyteaux v. Swigart*, 103 Ind. 596.

In order that an executory contract growing out of a compromise may be enforced, there must have been an actual dispute founded upon a colorable right. *U. S. Mortgage Co. v. Henderson*, 111 Ind. 24.

Moreover, while it was entirely competent for Warneke to

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make proof of the loss, when called upon for that purpose by the adjuster, it was beyond his power, unless specially authorized, to bind the plaintiffs, after he had assigned the policy to them, by any agreement with the company as to the amount which should be accepted as a satisfaction of its liability.

Without pausing to refer to the evidence in detail, it is sufficient to say it fully sustains the decision of the court. *American Ins. Co. v. Replogle*, 114 Ind. 1, and cases cited.

The judgment is affirmed, with costs.

Filed Dec. 19, 1888.

116	374
120	523
116	374
124	241
126	463
116	374
120	519

No. 13,154.

JOHNSON v. THE STATE, FOR USE OF DAVIDSON, DRAINAGE
COMMISSIONER.

DRAINAGE.—Enforcement of Assessment.—Complaint.—Sufficiency of Petition in Drainage Proceeding.—It is not necessary that a complaint to enforce a drainage assessment should aver that the persons named in the petition were land-owners at the time it was signed, as the judgment in the proceeding establishing the drain is conclusive as to the sufficiency of the petition. It is enough for the complaint to show the petition, notice and judgment thereon. It is also not necessary that the record should affirmatively show that assessments were made from time to time.

From the Benton Circuit Court.

D. E. Straight, U. Z. Wiley and S. F. Carter, for appellant.

A. W. Reynolds and E. B. Sellers, for appellee.

ELLIOTT, J.—This action is prosecuted by the relator to

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recover an assessment levied under the drainage law of 1881.

The appellant assails the complaint, but, as we think, without success. It is not, as counsel assume, necessary that a complaint to enforce a drainage assessment should aver that the persons named in the petition were land-owners at the time it was signed. It is enough for the complaint to show the petition, notice and judgment thereon. The judgment of the court settled the question of the sufficiency of the petition and all kindred questions. R. S. 1881, section 4280. Having once adjudged the petition sufficient, the court was not bound to again adjudicate upon it. Indeed, it had no right to do so in a collateral proceeding like this. The section of the statute to which we have referred makes the judgment conclusive, but it would be so in such a case as this without the statute. *Montgomery v. Wasem, ante*, p. 343.

The complaint shows that notices were posted and that the court in the original proceedings adjudged the notice sufficient, and this judgment can not be collaterally questioned. *Prezinger v. Harness*, 114 Ind. 491.

There are very many cases declaring this doctrine. We do not deem it necessary to cite them all, but content ourselves with referring to a few of the many. *Pickering v. State, etc.*, 106 Ind. 228; *Kleyla v. Haskett*, 112 Ind. 515, and cases cited; *Hackett v. State, etc.*, 113 Ind. 532; *Montgomery v. Wasem, supra*.

Other objections urged to the complaint are, as we are satisfied from a careful examination of it, founded upon a misapprehension of its allegations.

What we have said upon the subject of a collateral attack, in disposing of the objections to the complaint, applies to the questions made upon the admissibility of the proceedings in the Stamford ditch case.

We do not think it necessary that the record should affirmatively show that assessments were made from time to time, for we are of the opinion that where it appears that an

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assessment was made upon petition and notice, and that it was adjudged regular and proper in the original proceedings, it constitutes a valid and enforceable assessment.

Judgment affirmed.

Filed Dec 22, 1888.

116	376
130	523
122	84
116	376
194	449
125	463
116	376
128	76
116	376
143	519
116	376
146	321
116	376
148	471
116	376
155	488
156	496
156	167

No. 13,992.

HOBBS ET AL. v. THE BOARD OF COMMISSIONERS OF TIPTON COUNTY ET AL.

FREE GRAVEL ROAD.—*Proceeding to Establish.*—*Meeting of Viewers.*—*Time.*—*Presumption.*—*Injunction.*—Where the order of the board of commissioners, made in a proceeding to establish a free gravel road, required the viewers to meet on the 22d day of August, 1881, and the report of the viewers recites that in pursuance of the order they met "on the — day of August, 1881," it will be presumed, in a suit to enjoin the collection of assessments, in the absence of proof to the contrary, that the viewers met on the day fixed.

SAME.—*Petition.*—*Signing.*—*Collateral Attack.*—Where there is no affirmative showing that the petition for a free gravel road was not signed preliminarily by five interested land-owners, as required by section 5092, R. S. 1881, and where the record of the proceedings before the board of commissioners recites that the petition was signed by the additional number required by section 5095, the petition in these respects will be held sufficient when questioned in a suit to enjoin the collection of assessments.

EVIDENCE.—*Objection to.*—*Estoppel.*—A party who himself first resorts to evidence of doubtful competency can not afterwards object to evidence of the same kind when introduced by his adversary.

From the Clinton Circuit Court.

J. Jones and J. N. Sims, for appellants.

R. B. Beauchamp and S. O. Bayless, for appellees.

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ZOLLARS, J.—The board of commissioners established a free gravel road. Assessments, in the way of benefits, were made upon appellants' lands. They ask that the collection of those assessments shall be enjoined.

The action, being for an injunction, is a collateral assault upon the proceedings which resulted in a final order and judgment for the improvement, and the making and confirmation of the assessments.

A trial was had below, and resulted in a judgment for costs against appellants.

The proceeding for the establishment of the gravel road was instituted and carried to completion before the county board, under article 8 of chapter 70, R. S. 1881, section 5091, *et seq.*

Appellants assail the proceedings before the county board upon the ground, first, that the viewers and surveyor appointed by that board to view, locate, etc., the road, did not meet and take the proper oath on the 22d day of August, 1881, the day named in the notice to them, and fixed by the board. Their contention is, that because the viewers and surveyor did not thus meet and take the oath, and call to their assistance two chain-bearers, and one marker, and at once proceed in the discharge of their duties, the whole proceeding was, and is, without legal support, and void.

With the legal proposition involved in their contention, we need not stop here to deal. It is sufficient here, that appellants did not establish, by sufficient competent evidence, that the viewers and surveyor did not meet at the time and place fixed by the board. To sustain their averment that the viewers and surveyor did not thus meet, appellants introduced in evidence the record of the proceedings before the county board. A part of the record thus introduced was the report of the viewers. In that report, the viewers stated, amongst other things, the following: "In pursuance of a certified copy of said petition, and an order from the said board of commissioners appointing the undersigned as view-

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ers and surveyor of the route and work of said improvement prayed for, said certified copy and said petition with said order being delivered to us by the auditor of said county, we, the said viewers and surveyor, did meet on the — day of August, 1881, at the auditor's office of said county at the court-house," etc.

In a collateral attack like this, the recitals in that report fall short of showing that the viewers and surveyor did not meet on the day and at the place fixed by the county board. Indeed, they sufficiently show the opposite. They amount to a statement that, in meeting as the viewers and surveyor did, they followed out the order of the county board; acted in conformity to it, not only as to place, but also as to the time of meeting. It could hardly be said that they met in pursuance of the order of the board, if they met at a place, or at a time, different from the place and time named in the order. It is further stated, as will be observed, that they met in 1881, and in the month of August. The leaving of the day of the month blank does not overthrow the other statement that the meeting was in pursuance of—in conformity with—the order of the board. As above observed, appellants are attempting, by a collateral assault, to overthrow the proceedings before the county board. One of the weapons selected by them to accomplish that end is that portion of the report of the viewers above set out. It is insufficient. This court, in all cases, and especially in collateral assaults, must presume in favor of the regularity and validity of the proceedings of the courts of this State, including proceedings before county boards, until the contrary is satisfactorily shown by competent evidence, where evidence for such purpose is admissible. *Mathews v. Droud*, 114 Ind. 268; *White v. Fleming*, 114 Ind. 560; *Johns v. State*, 104 Ind. 552.

The above evidence adduced by appellants is not sufficient to break down the presumptions which support the proceed-

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ings before the board, and, while those presumptions stand, the proceedings can not fall.

As a further means of showing that the viewers and surveyor did not meet on the day fixed by the board, appellants resorted to oral testimony. That was met by oral testimony adduced by appellees. Considering all of the testimony thus adduced, it tends more strongly to overthrow than to support appellants' contention.

We need not decide as to the competency of that testimony. Appellants first resorted to it, and are not in a position now to object to the evidence brought forward by themselves, nor to complain that appellees were allowed to meet them with a like kind of evidence. *Hinton v. Whittaker*, 101 Ind. 344; *Lyon v. Lenon*, 106 Ind. 567; *Lowe v. Ryan*, 94 Ind. 450; *Meranda v. Spurlin*, 100 Ind. 380; *Dinwiddie v. State*, 103 Ind. 101.

Section 5092, R. S. 1881, which provides for the appointment of viewers by the county board, also provides that upon such appointment being made, the county auditor shall notify them of the time and place of their meeting, etc., and shall also give notice, by publication in a newspaper printed in the county, for three consecutive weeks next prior to said meeting, which notice shall state the time and place of said meeting, the kind of improvement asked for, the place of beginning, intermediate points, if any, and the place of termination.

That section also provides that, in the first instance, the petition to the county board for a gravel road must be signed by five or more of the land-holders whose lands will be assessed for the cost of the improvement.

Section 5095 provides that after the return of the report of the viewers the county board may make an order for the making of the improvement; "but such order shall not be made until a majority of the resident land-holders of the county whose lands are reported as benefited and ought to be assessed, and also the owners of a majority of the whole

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number of acres of all lands that are reported as benefited and ought to be assessed, shall have subscribed the petition mentioned in the second section of this act." Section 5092, *supra*.

It is not claimed by any one that the notice provided for in section 5092 was not given. That it was given in accordance with the requirements of that section is conceded. It is claimed, however, on the part of appellants, that, when the board made the order for the improvement, the petition had not been signed by the number of the land-owners required by section 5095, *supra*.

Both sides introduced the record of the proceedings before the county board. A copy of the petition for the improvement constitutes a part of that record. It shows that many signatures were attached to the original petition. And the record very clearly shows that the copy set out is a copy of the petition as it was presented to the county board in the first instance.

As we have stated, under section 5092, *supra*, the petition will be sufficient, in the first instance, if signed by five of the land-owners whose lands will be assessed for the cost of the improvement. The additional number is required by section 5095, after the return of the viewers.

In making up the record those additional signatures would not necessarily be shown by the petition itself, unless copied into the record a second time. We can not, therefore, by comparing the petition set out in the record with the report of the viewers, determine that the requisite number of land-owners did not sign the petition before the board made the order for the improvement. For aught that is shown they may have so signed it. In the absence of an affirmative and positive showing to the contrary, this court must presume that they did. The record, however, affirmatively shows that the petition was properly signed before the board made the order for the improvement.

In the record of the proceedings before the board is this:

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“The board now further finds that a majority of the resident land-owners of the county, whose lands are reported as benefited and ought to be assessed, have subscribed the petition praying for said improvement, and, also, the owners of a majority of the number of acres of all lands that are reported as benefited and ought to be assessed have subscribed the petition. And in determining the majority, no lands belonging to minor heirs have been counted for or against said improvement, unless represented by their legal guardian.” Following that entry is the order for the improvement.

The notice having been given as required by section 5092, *supra*, appellants can not, in this collateral proceeding, overthrow the order for the improvement, resting as it does upon the record before us, and above recited. In support of this conclusion a citation of some of our cases will be sufficient. *Black v. Thomson*, 107 Ind. 162; *Ely v. Board, etc.*, 112 Ind. 361; *Osborn v. Sutton*, 108 Ind. 443, and cases there cited; *Robinson v. Rippey*, 111 Ind. 112; *Strieb v. Cox*, 111 Ind. 299 (304); *McMullen v. State, etc.*, 105 Ind. 334; *Hollingsworth v. State*, 111 Ind. 289; *Young v. Sellers*, 106 Ind. 101; *Montgomery v. Wasem, ante*, p. 343.

After making the order for the improvement, the board appointed commissioners to apportion the estimated expenses, as provided by section 5096, R. S. 1881, and ordered that, after making such apportionment, the commissioners should file their report with the county auditor.

The board further ordered that, upon the filing of the report, the auditor should give notice of it, by publication in some newspaper published and of general circulation in the county, and should also give notice, for at least three consecutive weeks, of the time when the commissioners would meet at the county auditor's office to hear the same. That order was in accordance with, and in the language of, section 5096, *supra*, upon that subject.

About two months subsequent, the board was again in ses-

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sion, and, as stated in the record, the session was a special one, called by the auditor. At that session, the report of the commissioners was submitted to the board, and in all things confirmed. The following portion of the record, showing the confirmation of the report, is as much as need be here set out, viz.: "The board of commissioners having seen and examined the above report on gravel road No. 5, of the viewers (commissioners), finds that said viewers were legally notified of their appointment to make the assessment and apportion the costs and expense; * * * and also finds that notice of the filing and pending of said report has been duly given of the time fixed for the board to meet and hear said report, by publication thereof for three weeks successively, prior to the day named in said notice to hear and examine said report, in the Tipton Times, a public weekly newspaper of general circulation, printed and published in Tipton county, Indiana, proof of which is filed in words and figures following, to wit (here insert); and finds that said apportionment of the expense of building said road has been made by actual view of the premises mentioned and described in the order aforesaid, according to the benefits to be derived therefrom; and this being the day fixed and named in said notice to hear and examine said report, and there being no exceptions filed with the board to said report by any of the owners of the lands affected thereby," etc. After a further finding that all had been done in accordance with the law, is the order approving and confirming the report.

Counsel for appellants contend that there was no valid confirmation of the report of the commissioners, for the reasons that the board had not been properly convened by the auditor, and that no notice had been given of the filing of the report, and the day when the board would meet to hear the same. Their contentions are met and overthrown by the record of the proceedings before the board. It is therein stated that the board convened in special session to take action in relation to the gravel road in pursuance of a precept

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by the auditor directing such a meeting. They were in session, determined that the proper notices had been given, and on the same day confirmed the report of the commissioners and signed the record.

The record shows enough to protect the proceedings which resulted in the establishment of the gravel road, against the objections urged by counsel for appellant, in their endeavor to maintain this collateral assault upon those proceedings. In addition to the cases above cited, we add the late case of *White v. Fleming*, 114 Ind. 560.

Judgment affirmed, with costs.

Filed Dec. 20, 1888.

116	383
123	281
116	383
148	456
152	172

No. 13,172.

MANN ET AL. v. THE STATE, EX REL. LEE, AUDITOR.

MORTGAGE.—*Foreclosure.*—*Recording.*—*Subsequent Purchaser.*—Unless it affirmatively appears in a complaint for the foreclosure of a mortgage that a defendant claiming an interest in the mortgaged premises occupies the relation of a subsequent purchaser, an averment that the mortgage had been duly recorded is not essential. In such case the defendant must make his rights appear.

SAME.—*Description.*—*When Land Presumed to be in this State.*—A deed or mortgage made in the form prescribed by the law of this State, and purporting to have been acknowledged in this State, between parties residing in the State, and containing nothing to indicate a contrary intention, will be presumed to be of land in this State.

SAME.—*School Fund Mortgage.*—*Omission of County and State from Description of Land.*—*Presumption.*—Where both the county and State are omitted from the description of land embraced in a mortgage, but it appears on the face of the mortgage that it was executed by parties residing in a certain county in this State, for the purpose of securing a loan of school

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funds borrowed by the mortgagors through the auditor of that county, it will be presumed, without more, that the land is there situate.

SAME.—*Purchaser from School Fund Mortgage.*—*Bound by Mortgage though not Recorded.*—One who claims through a mortgagor who has given a mortgage to secure school funds, is bound by the mortgage, even though it is not recorded according to the registry acts.

From the Huntington Circuit Court.

T. G. Smith, J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellants.

MITCHELL, J.—Action by the State on the relation of the county auditor of Huntington county, to foreclose a mortgage executed by Mann and wife to the State for the use of the congressional school fund, to secure a loan of school funds made to Mann in 1865. Arthur M. Leaky was made a party defendant to answer as to any interest which he had, or claimed, to the real estate described in the mortgage, the averment in the complaint in respect to him being in effect that he claimed some interest in the land mortgaged adverse to the plaintiff. The mortgage set out in the body of the complaint contains the following recital, viz.:

“We, George W. Mann and Catharine Mann, of the county of Huntington, in the State of Indiana, for the use of the congressional school fund, mortgage to the State of Indiana all of the east half, etc., in section twenty-two (22), township twenty-seven (27) north, of range ten (10) east.”

The official certificate of the clerk and recorder of Huntington county, which accompanies the mortgage, begins as follows:

“State of Indiana, Huntington county, ss.: The undersigned, clerk and recorder of said county, in which is situate the land described in the foregoing mortgage, hereby certify,” etc.

The oath of the mortgagor in respect to the ownership of the land, and the absence of encumbrances thereon, was made before the county auditor. The execution of the mortgage was acknowledged before the same officer.

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There was no averment in the complaint that the mortgage was duly recorded, nor did it appear on the face of the mortgage and accompanying papers where the land was situate, except as indicated above.

There was a judgment of foreclosure against all the defendants.

Leaky, who alone assigns error here, makes two points against the complaint, (1) that it was insufficient as to him, in that it was not averred therein that the mortgage had been duly recorded; (2) that the mortgage was void on its face for want of a sufficient description of the land mortgaged.

In respect to the first objection, it is only necessary to say it no where appears in the complaint that the appellant was a subsequent purchaser. The registry acts are designed for the protection of subsequent purchasers, who purchase in good faith for a valuable consideration. It follows, that unless it affirmatively appears in a complaint for foreclosure, that a defendant claiming an interest in the mortgaged premises occupies the relation of a subsequent purchaser, an averment that the mortgage had been duly recorded is not essential. *Hoes v. Boyer*, 108 Ind. 494.

In respect to the second proposition, the settled rule is, that a deed or mortgage made in the form prescribed by the law of this State, which purports to have been acknowledged in the State, and between parties resident in the State, and which contains nothing to indicate a contrary intention, will be presumed to be of land in the State. *Dutch v. Boyd*, 81 Ind. 146.

It appears on the face of the mortgage that it was executed by parties residing in Huntington county, in this State, for the purpose of securing a loan of school funds borrowed by the mortgagor through the auditor of that county.

From the facts appearing upon the face of the mortgage it will be presumed, without more, that the land mortgaged is situate in Huntington county, in this State. *Brown v. Ogg*,

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85 Ind. 234; *Bryan v. Scholl*, 109 Ind. 367, and cases cited; *White v. Stanton*, 111 Ind. 540; *Noland v. State, ex rel.*, 115 Ind. 529.

It does not appear from the evidence that the mortgage in suit was recorded, nor that the appellant had actual notice of its existence when he acquired title to the land. The appellant therefore insists that the proof did not justify the finding and judgment of the court against him.

As we have seen, there was no issue tendered by the complaint requiring the plaintiff to make any proof upon the subjects above mentioned. As the complaint stood, it was incumbent on the appellant, in case he occupied the relation of a subsequent purchaser for a valuable consideration, without notice, to aver and prove the facts. It does not appear that he made any attempt to do so. It is true that in the second paragraph of his answer he averred that he "took title to said real estate as aforesaid without any notice of plaintiff's claim."

This, however, falls far short of an averment that he was a subsequent purchaser in good faith, and for a valuable consideration, and it is only purchasers of that description who are within the protection of the registry laws. Section 2931, R. S. 1881.

For anything that appears in the pleadings or proof, the appellant may have taken his title as a mere volunteer. He neither pleaded nor proved anything to the contrary. Besides, it has been held that one who claims through a mortgagor who has given a mortgage to secure school funds, is bound by the mortgage, even though it is not recorded according to the registry acts. *Stockwell v. State, ex rel.*, 101 Ind. 1; *Deming v. State*, 23 Ind. 416. There was no error.

The judgment is affirmed, with costs.

Filed Dec. 20, 1888.

 Phelps et al. v. Smith et al.

No. 13,189.

PHELPS ET AL. v. SMITH ET AL.

FRAUDULENT CONVEYANCE.—*Husband and Wife.*—A husband may cause land to be conveyed to himself and his wife, thus vesting in them a joint tenancy with all its legal incidents, and such conveyance is only impeachable at the suit of creditors on the ground of fraud.

SAME.—*Tenants by Entireties.*—Where the husband has property subject to execution more than sufficient to pay his debts, he is not guilty of fraud merely because he procures land owned by him to be conveyed to himself and wife as tenants by entireties.

SAME.—*Special Finding.—Fraud a Question of Fact.*—Where a cause of action depends upon the establishment of fraud, the special finding made in the case must state that there was fraud. Fraud is a question of fact, and can not be presumed, or inferred as a matter of law.

SAME.—*Conveyance to Put Property Beyond Reach of Creditors.*—A statement in the special finding that the purpose of the parties in having the husband's property, the value of which is not given, conveyed to himself and wife as tenants by entireties, was to place the property beyond the reach of creditors, is not in itself a finding of the fact of fraud.

SAME.—*When Conveyance not Fraudulent as to Creditors.*—A voluntary conveyance can not be adjudged fraudulent at the suit of creditors, where there is no actual fraud, if, at the time the conveyance was made or the suit was brought, the grantor had property subject to execution sufficient to pay his debts.

SAME.—*Partnership.—Dissolution.—Husband and Wife.*—Where a partner, being indebted to his wife, executes to her a promissory note, she may, upon the subsequent dissolution of the firm and division of the partnership property, subject his property to sale in satisfaction of a judgment obtained on the note, and she is entitled to the proceeds as against partnership creditors having no specific lien.

SAME.—*Action to Set Conveyance Aside.—Right to Maintain.*—It is the law of this State that a creditor, although he has not taken judgment, may successfully assail a fraudulent conveyance.

CONSPIRACY.—*To Defraud Creditors.—Sale.—Accounting May be Enforced.*—A person who enters into a conspiracy to defraud the creditors of a co-conspirator, and who, pursuant to the purpose of the conspiracy, obtains a judgment and secures a sale under an execution thereon of property which of right should have gone to the creditors of the co-conspirator, may be compelled to account for the proceeds of the sale.

From the Montgomery Circuit Court.

116	387
117	391
119	53
119	290
121	281
121	304
122	264
116	387
124	160
126	57
127	270
116	387
129	585
116	387
130	422
116	387
131	470
132	58
132	56
133	222
133	373
116	387
132	222
116	387
137	266
139	30
139	609
139	700
116	387
140	589
143	557
116	387
145	603
116	387
154	85
154	90
116	387
157	15
157	12
116	387
164	348

Phelps *et al.* v. Smith *et al.*

E. C. Snyder, R. J. Greener, P. S. Kennedy, S. C. Kennedy, T. H. Ristine and H. H. Ristine, for appellants.

G. W. Paul, J. E. Humphries and W. W. Thornton, for appellees.

ELLIOTT, J.—Stated in an abridged form, the facts set forth in the special finding are these: From the 29th day of March, 1883, until the 9th day of June, 1884, John B. Smith and Thomas B. Collins were partners doing business at Anderson and at Crawfordsville, in this State. On the 30th day of January and the 8th day of May, 1884, Smith & Collins, as partners, became indebted to the plaintiffs in the sum of \$936, and that sum was due and unpaid when this suit was brought. The partnership was dissolved on the 9th day of June, 1884. Smith, under the agreement of dissolution, took the stock of goods at Anderson, and Collins took that at Crawfordsville. Between January 30th, 1884, and the date of the dissolution of the partnership, Smith and Collins became largely indebted to the appellees and others. They were insolvent at the time the partnership was dissolved, and have so continued. On and prior to the 10th day of December, 1883, Jennie C. Smith was the wife of John B. Smith. On that day, John B. and Howard W. Smith were the joint owners of a tract of land and made parol partition of it. To carry into effect this partition deeds were executed and delivered. After John B. Smith had received his deed, he and his wife conveyed the land to Howard W. Smith, and he immediately conveyed the land to John B. Smith and his wife. The deed was recorded on the 8th day of January, 1884. This conveyance was a voluntary one, and, as the finding recites, “was made for the sole purpose of placing the entire title in John B. Smith and his wife as tenants by entireties, and beyond the reach of his present or future creditors.” At the time this deed was executed, John B. Smith had no other individual property subject to execution, but he then owed no individual debts.

The indebtedness of the firm of Smith & Collins at that time was \$3,000, and its assets \$6,000. The indebtedness of the firm due at the time the conveyances were made was subsequently all paid by the firm, and, in the language of the finding, "the payments were made out of cash then in the hands of the firm, from collections made afterwards on bills then due from former sales of goods then on hands, and sales of goods subsequently purchased by the firm and for which it still owes the wholesale creditors." On and before the 29th day of May, 1882, Elizabeth Collins was the wife of the defendant Thomas B. Collins. Prior to that day, her husband made her a gift of \$3,700, and on that day he borrowed from her the identical money which he had previously given her. To secure its payment, he executed his promissory note, which was signed by John B. Smith, a short time before the dissolution of the firm of Smith & Collins, but no consideration passed to Smith. At the time Smith signed the note he was insolvent, and has so remained. Smith & Collins also obtained a loan from the First National Bank of Crawfordsville, and after the dissolution of the partnership suffered judgment to be rendered against them. Their purpose in creating this debt and suffering judgment was to defraud their creditors.

On the 30th day of June, 1884, Elizabeth Collins instituted an action on the note executed to her by her husband and Smith, and recovered a judgment. On the judgment recovered by her executions were issued and were levied upon the goods at Anderson and at Crawfordsville. The goods at Anderson were levied upon and sold as the property of John B. Smith, and those at Crawfordsville were seized as the property of Thomas B. Collins. The purpose of John B. Smith in signing the note, and that of Smith & Collins in suffering judgment on the note and the seizure of the goods of the partnership upon the execution issued on the judgment, was to defraud their creditors, and of this purpose Elizabeth Collins had full notice.

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On the 9th day of June, 1884, and thenceforward, Thomas B. Collins was insolvent. The executions were issued on the judgments of Elizabeth Collins and the bank after dissolution, and the property taken by the partners under the agreement of dissolution was seized and sold.

The conclusions of law stated by the court are :

"1st. That the plaintiffs are entitled to recover judgment against the defendants John B. Smith and Thomas B. Collins in the sum of \$1,029.48.

"2d. That the conveyances from John B. Smith and wife to Howard W. Smith, and from Howard W. Smith to John B. Smith and Jennie C. Smith, of date January 4th, 1884, are valid and effectual as against the creditors of Smith & Collins.

"3d. That the plaintiffs are not entitled to take judgment, on their complaint and the facts found, against the defendant Elizabeth Collins."

The course of argument pursued by the appellants' counsel makes it necessary to consider the case only in so far as the rights of Mrs. Smith and Mrs. Collins are concerned, for it is not asserted that there was any error in the proceedings except such as it is alleged were committed in their favor. We, therefore, confine our discussion and decision to the questions arising on the issues joined between the appellants and Jennie C. Smith and Elizabeth Collins. The issues and the questions presented by Mrs. Smith are very different from those presented by Mrs. Collins, and we shall first dispose of the case in so far as it affects the rights of the former.

The rights of Mrs. Smith depend upon the deed executed to her and her husband by Howard W. Smith on the 4th day of January, 1884. If that deed is not invalid as against creditors, then the second conclusion of law stated by the trial court is right, and the judgment in her favor must be affirmed.

The deed to Mrs. Smith and her husband is valid, and constitutes them tenants by the entirety, unless it can be ad-

judged from the facts stated that it is vitiated by fraud. A husband who is not insolvent may, in good faith, unquestionably cause land to be conveyed to himself and his wife, and thus vest in himself and wife a joint tenancy with all its legal incidents. The creation of the tenancy is the act of the grantor, but the incidents are annexed by the law. It can not be held that a husband, who has property subject to execution more than sufficient to pay his debts, is guilty of fraud merely because he causes land owned by him to be conveyed to himself and his wife as tenants by the entireties. It is certainly true that a husband not in debt, or one in debt but having ample property subject to execution to pay all his debts, may, in good faith, make an absolute gift of land to his wife, and, if he may do this, surely he may cause the land to be so conveyed as to make the tenure such as to vest her with a joint right in possession coupled with the incident of survivorship. The conveyance, whatever its character or effect, provided it creates no secret trust, is valid unless there be legal or actual fraud. We assume, therefore, that the deed which vested in Mrs. Smith an estate in the land jointly with her husband is only impeachable at the suit of creditors upon the ground of fraud, and that if the creditors do not show it to be fraudulent it must be upheld.

The special finding does not show that there was any actual fraud on the part of Mrs. Smith or her husband. It is true that it is stated that the purpose was to place the property out of the reach of creditors, but it is not found that this was a fraudulent purpose. Fraud is not presumed. The presumption is in favor of honesty and good faith until the contrary appears. This rule would require us to decline to impute to the parties any corrupt motive. But there is another rule which applies here, and that is this: where a cause of action depends upon the establishment of fraud, the special finding must state that there was fraud. The rule was thus stated in *Eleton v. Castor*, 101 Ind. 426: "The court below found these facts, but failed to find the ultimate fact, that in

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all this there was any collusion between the brothers, or that there was any fraud, or intent to defraud any one. If appellants were satisfied that the several facts mentioned were badges of fraud, and that fraud in fact should have been found, their proper course was by motion for a new trial. Fraud in such cases is a question of fact, and hence we can not determine it here as a matter of law from the facts here found."

The rule stated in the quotation we have made is asserted in other cases, and is in harmony with the decisions upon kindred questions. *Stix v. Sadler*, 109 Ind. 254; *Bartholomew v. Pierson*, 112 Ind. 430.

By our statute the question of fraud is made one of fact, and where fraud is essential to the existence of a cause of action it must be found as a fact, and not left to be inferred as a matter of law. *Rose v. Colter*, 76 Ind. 590.

This court may, doubtless, give to facts their legal effect; but where, as here, the case is presented upon a special finding, it can not add a new and substantive fact to those stated by the trial court.

It is to be kept in mind that there is no finding that John B. Smith meant to place the partnership assets beyond the reach of creditors, nor that he intended to incur debts that he could not pay; nor, indeed, that he intended to incur any new debts at all. Nor is the value of the real estate stated in the special findings. For anything that appears it was of less value than six hundred dollars, and exempt from the claims of creditors. If exempt, creditors have no right to complain of its conveyance. *Blair v. Smith*, 114 Ind. 114; *Dumbould v. Rowley*, 113 Ind. 353; *Barnard v. Brown*, 112 Ind. 53; *Taylor v. Duesterberg*, 109 Ind. 165; *Faurol v. Carr*, 108 Ind. 123; *Burdge v. Bolin*, 106 Ind. 175.

As the value of the property is not stated, and as the presumption is in favor of good faith, we must assume that the husband did not convey an unreasonable amount of property to his wife.

The legal effect of a conveyance to a husband and wife is to place the land beyond the reach of the creditors of the husband during the life of the wife, and, in the event of her survivorship, vest her with title, and all that the facts show is that the partners intended that the conveyance of Howard W. Smith should have this effect.

It can not, it seems clear to us, be assumed that there was actual fraud in a case where no more appears than that a conveyance was intended to have precisely the force and effect given it by law. The assumption can not be made without violating the rule that the presumption is in favor of honest dealing, nor without also violating the rule that where a fact essential to a cause of action is not found, the presumption is, where the plaintiff has the burden, that it does not exist. *Stix v. Sadler*, *supra*, and cases cited; *Meeker v. Shanks*, 112 Ind. 207.

We can, of course, do no more than decide the case as it comes to us upon the special finding, and upon that finding we can not assert that there was any actual fraud. The exception to the conclusions of law concedes that the facts are correctly found, and if a party desires to challenge the correctness of the finding he must move for a new trial. *Warren v. Sohn*, 112 Ind. 213, and cases cited.

We can not, therefore, inquire what conclusions of fact might be drawn from evidentiary facts, but must take the ultimate facts as the special finding presents them, and apply the law to them. *Elston v. Castor*, *supra*. This necessarily restricts the power and duty of the court within much narrower limits than would hedge it in if the evidence were before the court and we were authorized to determine what inferences of fact should be drawn from the evidence.

Having ascertained that there is no actual fraud shown by the special finding, we come now to the question as to whether there is any constructive or legal fraud. Much that has been said applies to this phase of our inquiry. For years it has been the rule in this State, asserted by statute and

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affirmed by the adjudged cases, that fraud, whether actual or constructive, is a question of fact. Nor does the statute merely declare that fraud is a question of fact, but it also declares that a conveyance shall not be deemed fraudulent merely because it was a voluntary one. Its language is clear and strong; thus it reads: "The question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration." R. S. 1881, section 4924.

Many cases have been decided upon this statute, and they all agree that fraud, whether actual or constructive, is a question of fact, and that a voluntary conveyance can not be adjudged fraudulent at the suit of creditors where there is no actual fraud, if at the time the conveyance was made, or the suit was brought, the grantor had property subject to execution out of which the claims of his creditors could be paid. *Maple v. Burnside*, 22 Ind. 139; *Ewing v. Patterson*, 35 Ind. 326; *Parton v. Yates*, 41 Ind. 456; *Pence v. Croan*, 51 Ind. 336; *Sherman v. Hogland*, 54 Ind. 578; and cases cited; *Hardy v. Mitchell*, 67 Ind. 485; *Noble v. Hines*, 72 Ind. 12; *Leasure v. Coburn*, 57 Ind. 274; *Luce v. Shoff*, 70 Ind. 152; *Bruker v. Kelsey*, 72 Ind. 51; *Rose v. Colter*, 76 Ind. 590, and cases cited; *McLaughlin v. Ward*, 77 Ind. 383; *Wooters v. Osborn*, 77 Ind. 513; *Lockwood v. Harding*, 79 Ind. 129; *Morris v. Stern*, 80 Ind. 227; *Jarvis v. Banta*, 83 Ind. 528; *Powell v. Stickney*, 88 Ind. 310; *Sedgwick v. Tucker*, 90 Ind. 271; *Taylor v. Johnson*, 113 Ind. 164.

The principle which our cases assert and in various phases apply is substantially that asserted in *Rice v. Perry*, 61 Me. 145, where it was said: "A fraudulent purpose is an important element in the case, but it is not the only one; there must be superadded to it in addition to the sale, actual fraud, hindrance, or delay resulting therefrom to the creditors.

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The sale will be upheld unless the fraudulent purpose is actually accomplished. Thus, if, notwithstanding the sale, Whitehouse & Goodwin retained * * sufficient to pay the debt of Wattson & Clark, and equally open, known, and accessible to them with that sold, the sale would not be void, whatever may have been the secret purpose of the parties to it. The reason for considering the sale void in this class of cases is that creditors are damaged thereby; and when the reason is wanting the rule itself becomes inapplicable."

There is, as our cases have always affirmed, no reason for stigmatizing a conveyance as fraudulent when the grantor has, at the time it is made, abundant property subject to execution out of which all his debts could be collected. Suppose, for illustration, a man to have ten thousand dollars' worth of property, and to be in debt no more than five hundred dollars, and that he should make a gift to his wife of five thousand dollars. Could it be said with justice that he was guilty of fraud? The case before us is not different in principle from the supposed case. At the time the conveyance was made the grantor owed no individual debts, the firm of which he was a member did owe three thousand dollars, but it had six thousand dollars of property subject to execution with which to pay its indebtedness. Moreover, the debt of the firm existing at the time the conveyance was made was subsequently paid in full, so that the creditors who now complain gave Smith & Collins credit long after the conveyance was made and recorded

Counsel for appellants make ingenious inferences from the facts found, and upon those inferences construct a very plausible argument. If we were dealing with the evidence there would be much force in their argument, but we have before us a special finding, which, as the authorities cited prove, we must assume contains all the facts, and we can not infer that others exist. If there were other facts, the appellants should, as we have already suggested, have pursued a different course. We limit our decision to the facts before us,

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and assume, as we must, that no others favorable to the plaintiffs were proved.

Counsel say: "We are aware that it is a well settled rule of law of this State that a voluntary conveyance will not be set aside as fraudulent if at the time it was made the grantor retained sufficient property subject to execution to pay his debts; but we insist that this rule does not apply to the case in hand. Here one of the grantees is the debtor. The conveyance was made while he was a debtor. It was made for the purpose of placing his property beyond the reach of his present as well as future creditors. His wife and co-grantee knew of this design. It is true the court does not say so in so many words, but the court does say that John B. Smith and his wife conveyed the land to Howard W. Smith, and that Howard W. Smith conveyed back to John B. Smith and wife for the sole purpose of placing the property out of the reach of creditors."

If all the assumptions of counsel were correct, then they might, perhaps, escape the force of the general rule which they concede our cases establish. But many of these assumptions are groundless. In the first place, while it is true that John B. Smith was indebted as a partner, it is also true that the partnership had property double in value the amount of the indebtedness. In the second place, it is not found, even indirectly, that Smith himself, at the time the conveyance was made, had any intention of defrauding creditors. It is not even found that he then had any thought of incurring any debt. It does, on the contrary, appear that he had property abundantly sufficient to pay his debts, and it could not be presumed, even if the facts stated in the finding were treated as evidentiary and not ultimate facts, that he intended to contract debts which he could not pay. In the third place, it is not found that Mrs. Smith knew that her husband was in debt, or intended to become indebted. Nor, indeed, is it found that the land conveyed was ever subject to the claims of the husband's creditors.

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The utmost that can be inferred is that he, being then solvent, intended to place his property where it could not be reached during the lifetime of his wife, or, in case she survived him, where it could not be taken from her at all. But when this conveyance was made he had a right to have given it to his wife absolutely, and that he chose to do less does not invalidate the conveyance as against the wife. As to her the conveyance is valid, and that is the only question here. Under the law she might have been the grantee of the entire estate, and the fact that she does not get the estate absolutely does not invalidate the conveyance.

From whatever point of view the case is considered, the conclusion must be that, upon the facts stated in the special finding, regarded, as the law requires us to regard them, as the facts, and all the facts in the case, the conveyance is valid as to Jennie C. Smith.

The case, in so far as it affects the rights of Mrs. Collins, remains for consideration. That Mrs. Collins had a just claim against her husband is settled by the special finding. As against him she had a clear right to take judgment and issue execution. If she had this right, then, of course, she had a right to levy her execution upon the property of her debtor.

There is no finding that she was guilty of any fraud with respect to her husband's indebtedness, and we can see no reason why she was not entitled to the sum realized from the sale of the stock of goods at Crawfordsville which passed to her husband under the agreement of dissolution. The appellees, as partnership creditors, had no specific lien upon that property. *Louden v. Ball*, 93 Ind. 232; *Davis v. Delaware, etc., Canal Co.*, 109 N. Y. 47; *Hanover Nat'l Bank v. Klein*, 64 Miss. 141 (60 Am. R. 47); 2 Bates Partnership, section 847.

As Mrs. Collins had a just claim against her husband, and as she did no more than enforce that claim against his property in levying her execution upon the goods at Crawfords-

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ville, she can not be compelled to refund to the appellees what she received from the sale.

A more difficult question arises respecting the sale of the property at Anderson which passed to Smith under the agreement of dissolution. In order to present the question, we copy literally from the special finding: "That the note was so signed by John B. Smith, and the judgment so consented to by him, for the fraudulent purpose of cheating, hindering and delaying the creditors of the firm of Smith & Collins, and for the purpose of enabling Elizabeth Collins to subject the stock of goods which had belonged to the firm of Smith & Collins, and which became his individual property upon the dissolution of said firm, to sale to pay and satisfy said debt, of which fraudulent purpose of the defendant Smith, the defendant Elizabeth Collins then and there had notice." This finding, in connection with others, shows that Mrs. Collins became a party to the fraud; that she yielded no consideration for the note upon which she obtained judgment; that from property sold pursuant to her fraud she has realized the sum of \$1,740.47, which she withholds from the creditors of her fraudulent debtor. It is our judgment that she is chargeable in equity with this amount. Equity will compel her to account for the sum acquired by fraud and will not suffer her to enjoy the fruits of her wrong. *Jones v. Reeder*, 22 Ind. 111; *Blair v. Smith*, *supra*, and cases cited; *Smith v. Selz*, 114 Ind. 229; *Chamberlin v. Jones*, 114 Ind. 458; *Mason v. Pierron*, 69 Wis. 585; *Decker v. Decker*, 108 N. Y. 128.

In the case last cited the question was presented very like it is here, and it was held that one who is a party to a fraudulent transfer of property, for the purpose of defrauding creditors, is liable to the creditors to the extent of the property in his hands and to the value of that which has been sold by him.

Counsel cite us to *Dormueil v. Ward*, 108 Ill. 216, and other cases holding that only creditors who have obtained

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judgments are entitled to invoke the aid of courts of equity against fraudulent conveyances, but it is enough to say that this is not the rule under the code of Indiana. *Field v. Holzman*, 93 Ind. 205, and authorities cited, p. 209.

What we have said disposes of the questions presented by the appellee's assignment of cross-errors, and we need not discuss the questions it presents.

The judgment as to Jennie C. Smith is affirmed, and as to so much of the judgment as holds that the appellee Elizabeth Collins is not bound to account for the money received from the sale of the goods which passed to John B. Smith under the agreement dissolving the partnership of Smith & Collins, the judgment is reversed, with instructions to restate the conclusion of law on this point, and enter judgment requiring the appellee Elizabeth Collins to account for the sum received from the sale of such property.

Filed June 27, 1888.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—The principal point decided affecting the rights of Mrs. Collins, who petitions for a rehearing, may be thus stated: A defendant who enters into a conspiracy to defraud the creditors of a co-conspirator, and who, pursuant to the purpose of the conspiracy, obtains a judgment, secures a sale under an execution thereon, thereby securing and retaining the avails of property that, of right, should have gone to the good-faith creditors of the co-conspirator, may be compelled to account for the proceeds of the sale so procured by fraud.

As our former opinion shows, we sustained our conclusion by ample authority, and we then thought, and still think, that it rests on solid principle. Neither in the original argument nor in that on this petition was there cited any relevant authority to the contrary.

We did not overrule the case of *Tasker v. Moss*, 82 Ind.

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62, nor was it necessary to do so ; we did, however, deny its relevancy. We deny its relevancy because, whatever may be thought of its soundness, it is easily discriminated from this case, for here the fraudulent vendee received and retains the proceeds of property which ought to have gone to the *bona fide* creditors, and not the person who, by fraud, was made to seem a creditor, but, in fact, was not.

The cases of *First Nat'l Bank v. Carter*, 89 Ind. 317, and *Beach v. Carter*, 93 Ind. 602, are not in point, for here the special finding shows that the defendant was an active participant in the fraud. It appears in the special finding not only that Mrs. Collins had actual knowledge of the fraud, and participated in it as a conspirator, but also that she paid no consideration whatever for the claim she asserted against Smith, and by means of which she consummated her fraudulent purpose.

We disposed of the decisions in other States which declare that only judgment creditors can assail a fraudulent conveyance, by reference to our statute and our decisions. To the cases referred to in the former opinion we might add others if it were necessary. It is, and long has been, the law of Indiana that a creditor, although he has not taken judgment, may successfully assail a fraudulent conveyance. *Field v. Holzman*, 93 Ind. 205 ; *Lindley v. Cross*, 31 Ind. 106 ; *Love v. Mikals*, 11 Ind. 227.

No question as to parties was made in the court below, and none can be made here. We are not concerned with the question as to how the funds derived from the judgment shall be distributed, since that question is not before us. It may be true that if there are other creditors, they will be entitled to share in the avails of the judgment when it is enforced, but that is nothing to the purpose. Here we are required to decide, and, properly, can only decide, whether, upon the pleadings as the record presents them and the special finding as it is written, the plaintiffs were entitled to judgment. If other creditors come in and present an issue involving the

distribution of the proceeds of the judgment, the question as to what the decree shall be will arise ; but it is not now before us, as no pleadings of any description were filed presenting that question. If the complaint was thought defective for lack of parties, there was a plain method of attack ; or, if facts not apparent on the face of the complaint required the presence of other parties, the question could easily have been presented by an answer.

The cases of *Adler v. Fenton*, 24 How. 407, and *Lamb v. Stone*, 11 Pick. 527, can not, it is very clear, be of force in a jurisdiction like ours, where the same tribunal possesses both law and chancery powers, and where the statute gives a creditor, who has no judgment, a right to relief against a fraudulent conspiracy and a fraudulent conveyance of property. *Adler v. Fenton*, *supra*, in truth sustains our position, for it is there said : "Unquestionably, the claims of morality and justice, as well as the legitimate interests of creditors, require there should be protection against those acts of an insolvent or dishonest debtor that are contrary to the prescriptions of law, and are unfaithful and injurious. But the Legislature must determine upon the remedies appropriate for this end." Our statutes and our decisions have given the honest creditor the protection which the Supreme Court of the United States says the claims of morality and justice require. It would be a bitter reproach to our courts if they should deny this protection, clothed as they are with the most comprehensive powers of law and equity. But the doctrine we here declare is by no means a novel one in this court. It was declared in *Jones v. Reeder*, 22 Ind. 111, and has been expressly approved. *Blair v. Smith*, *supra* ; *Chamberlin v. Jones*, *supra*.

We think the true principle which underlies this class of cases is that stated by GIBSON, J., in *Penrod v. Mitchell*, 8 Serg. & R. 523 : "Without doubt," said this great judge, "a conspiracy to enable a debtor to elude the process of the law, is immoral, and pernicious in its consequences to society ; but

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as it is punishable by indictment, there is no reason that the actors in it should receive castigation for what affects the public, in a civil action whose legitimate object is the redress of private injury. If the value of the property assigned were not the standard, there would be no reason why damages beyond the amount of the judgment might not be given, which, I apprehend, could not be done, even if the value were of greater amount than the judgment." We apply this principle here. We adjudge that the wrong is pernicious, that it is punishable as a crime (R. S. 1881, section 2156), that from it the wrong-doer shall reap no benefit, and the creditor suffer no loss. This is nothing more than a just application of the maxim that no man shall take advantage of his own wrong, since, to give the dishonest conspirator benefit would be to yield him the advantage at the expense of the creditor. As held in *Chamberlin v. Jones*, *supra*, and many other cases, the wrong-doer who obtains property by fraud and thus excludes good-faith creditors, takes it as trustee and may be compelled to account, and if, as is well settled, the specific property can not be recovered, the plaintiff may have relief by way of compensation. *Blair v. Smith*, *supra*, and authorities cited.

The decision in *Phipps v. Sedgwick*, 95 U. S. 3, if conceded to be otherwise relevant, is not in point, because the court placed its judgment upon the disability created by coverture, saying that "Such a proposition would be a very unjust one to the wife still under the dominion, control, and personal influence of the husband." Manifestly this rule can not apply in jurisdictions where a married woman possesses nearly all the rights of a *feme sole*, and where "ability is the rule and disability the exception." *Lane v. Schlemmer*, 114 Ind. 296; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581; *Bennett v. Mattingly*, 110 Ind. 197; *Chandler v. Spencer*, 109 Ind. 553; *Rosa v. Prather*, 103 Ind. 191.

But for another reason the case cited is not relevant; in that case there was constructive and not actual fraud. Here

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there was actual fraud and a corrupt purpose. We have not held, nor intimated, that the vendee would be liable where there was only constructive fraud. We are concerned only with cases where the fraud is an actual one, executed by means of a corrupt conspiracy.

Petition overruled.

Filed Dec. 20, 1888.

No. 13,997.

DURHAM v. SHANNON.

REFLEVIN.—*Witness.*—*Decedent's Estate.*—*Matters Affecting.*—*Administrator's Sale.*—*Gift.*—Section 498, R. S. 1881, disqualifying certain persons to testify as to matters occurring during the lifetime of a decedent and affecting his estate, does not prohibit the plaintiff in an action of replevin, brought against a purchaser at an administrator's sale to recover possession of a horse sold as property of the decedent, from testifying that the decedent had made him a gift of the animal.

SAME.—*Evidence.*—*Declarations.*—*Res Gestæ.*—In such action, declarations of the decedent, made a day or two before he purchased the horse, that he intended to buy a horse for the plaintiff, and declarations made after the purchase, and while the animal was ostensibly in his possession, that he had bought the horse for the plaintiff, are competent as part of the *res gestæ*.

From the Vigo Superior Court.

S. B. Davis, S. C. Davis, R. B. Stimson and S. C. Stimson,
for appellant.

J. E. Lamb, G. W. Faris and S. R. Hamill, for appellee.

MITCHELL, J.—Replevin by Shannon to recover the possession of a mare and colt, of which he alleges he is the

116	403
121	424
122	231
123	314
123	524
116	403
124	426
116	403
140	496
116	403
152	474

owner, and which it is charged the defendant, Durham, unlawfully took and detained, etc.

Upon an issue made by the general denial, there was a trial resulting in a verdict and judgment for the plaintiff.

It appeared that Patrick Shannon, since deceased, purchased the mare at a public sale in 1877. The plaintiff, although not related by blood, had been in some sense a member of Shannon's family from his early childhood, and claimed that the latter had presented him the mare, on the day he purchased her, as a gift. The animal remained in the possession of Shannon, who used her apparently as his own, until the fall of 1885, when he sent her to Lexington, Kentucky, to be bred. She remained there until after Shannon died, which occurred in April, 1886, and until after she had the colt in controversy. Subsequently the administrator of the decedent's estate paid the bills incurred in Kentucky, and while the mare and colt remained in that State they were sold by order of the court by the administrator to the defendant, Durham, for \$500, who brought them to Indiana at his own expense, in March, 1887. The plaintiff commenced this suit in May following.

At the trial the plaintiff produced witnesses who gave evidence of declarations made by Patrick Shannon in his lifetime, tending to show that he had given the animal to the plaintiff, and the latter was also permitted to testify in his own behalf, to the effect that the decedent had presented the mare to him on the day she was purchased and brought to the Shannon homestead.

On the appellant's behalf it is now contended that the plaintiff was incompetent to testify concerning the alleged gift of the mare to him by the decedent in his lifetime, within the prohibition contained in section 498, R. S. 1881.

This section enacts that "In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or

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against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate."

In determining the competency of a witness, the accepted rule is not to regard the mere letter of the statute, but to look to its spirit and purpose. *Clift v. Shockley*, 77 Ind. 297; *Wiseman v. Wiseman*, 73 Ind. 112; *Ketcham v. Hill*, 42 Ind. 64; *Peacock v. Albin*, 39 Ind. 25.

The evident purpose of the section under consideration was to protect the estates of deceased persons from the apprehended danger of permitting the surviving party to a contract or transaction to testify in respect to it, after the lips of the other party had been closed by death. Hence a party to a transaction involved in the issue on trial is put under a statutory disability, and is excluded from testifying when the other party to the same matter is disabled by death, and where he is represented in the action which involves such contract or transaction by an executor or administrator, or some one who, in legal contemplation, stands in his place, and when the judgment to be rendered may affect his estate either directly or indirectly.

Accordingly it was held in *Taylor v. Duesterberg*, 109 Ind. 165, that where a party to a contract or transaction is dead, and his rights in the contract or subject-matter have passed to another, who represents him in the action or proceeding, the true spirit and purpose of the act excludes the surviving party to the transaction from testifying in relation to matters pertaining thereto, which occurred during the lifetime of the decedent. Generally speaking, three things must concur in order to exclude the testimony of the surviving adversely interested party: (1) The transaction, or the subject-matter thereof, must be in some way directly involved in the action or proceeding, and it must appear that one of the parties to the transaction, about to be proved, is dead. (2) The right of the deceased party must have passed,

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either by his own act or that of the law, to another, who represents him in the action or proceeding in the character of executor, administrator or in some other manner in which he is authorized by law to bind the estate. (3) It must appear that the allowance to be made or the judgment to be rendered may either directly or indirectly affect the estate of the decedent.

In the case last above cited, both parties to the transaction, concerning which the parties thereto were called to testify, were alive. The decedent was not a party to the matter about which testimony was offered, and had no interest in the transaction when it occurred, and although he was represented by an administrator and his estate was interested in the subject-matter of the transaction, and was liable to be affected by the judgment to be rendered, it was nevertheless ruled, that since the transaction only came collaterally in question, and the decedent was not a party to it, the parties were competent to testify.

Clift v. Shockley, supra, is a representative case showing the proper construction of the statute when considered from another point of view. In that case an administrator had paid a claim against the estate of the decedent without the order of the court. Exceptions were taken to his account, and the propriety of his conduct in making payment of the claim came in question. He called the person whose claim he had paid as a witness to prove that it was just, and that it was properly paid. It was held, although the witness was not a party to the proceeding and had no interest in the event of the suit, that since the purpose of the statute was to guard estates, and since the testimony offered was liable to affect the estate injuriously, the witness was properly excluded from testifying.

The cause of action in the present case is the wrongful taking and unlawful detention of the property described in the complaint. The parties to this cause of action are both living. The transaction between the plaintiff and Patrick

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Shannon arises incidentally only, and is collateral to the real cause of action.

Neither of the parties to the action in any sense represents the estate of Patrick Shannon, nor will the judgment bind or conclude the estate. True, the plaintiff predicates his title to the property in dispute upon the gift alleged to have been made to him by the decedent, and if the estate of the latter was in any way represented in the action, or interested in the controversy, so as to be concluded by the judgment, the policy of the statute would exclude the plaintiff's testimony. Such, however, is not the fact, and the case is, therefore, neither within the reason nor the letter of the statute. *Downs v. Belden*, 46 Vt. 674; *Bradly v. West*, 68 Mo. 69.

If the administrator can be required to reimburse the purchaser, a subject concerning which we intimate no opinion, he may maintain replevin for the property, without being in any way embarrassed by the judgment rendered in this action, in which the estate was in no way represented.

The court admitted in evidence declarations made by Patrick Shannon a day or two before he purchased the mare in controversy, to the effect that he intended to purchase a colt for the plaintiff, and also declarations made after the purchase, and while the animal was ostensibly in his possession, to the effect that he had purchased her for the plaintiff.

These declarations were properly admitted; the first as being substantially contemporaneous with the act of purchasing, and while it was in progress, and where one is competent, the contemporaneous declarations are also admissible as part of the *res gestæ*. The last were admissible under the rule which declares that the declarations of a person, while in possession of personal property, in disparagement of his own title or explanatory of the character of his possession, are always received as part of the *res gestæ*. *Creighton v. Hoppis*, 99 Ind. 369, and cases cited.

It is quite true that declarations made by a person under whom a party claims, after the declarant has parted with his

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right, are not admissible to affect the title of another person claiming from the same source. But as possession of personal property is the *indicia* of ownership, declarations made by a person while in possession, in derogation of his ownership, are admissible, not only as against the declarant, but as against one claiming to have derived a title under him, subsequent to such declarations.

The rule of law is, that where it becomes important to inquire into the nature of an act, or the character of possession of property, proof of what the person said while performing the act, or while the possession continued, is admissible in evidence.

An examination of the instructions, about which some complaint of a general character is made, leads us to the conclusion that they are not justly subject to adverse criticism. The evidence, if believed, was, of course, sufficient to sustain the verdict. We find no error.

The judgment is therefore affirmed, with costs.

Filed Dec. 21, 1888.

116	408
120	262
116	408
152	374

 No. 14,367.

ELLIS ET AL. v. BAKER.

MARRIED WOMAN.—Mortgage.—Suretyship.—Heirs may Plead Coverture of Mother.—Estoppel of Husband.—Under section 5119, R. S. 1881, a mortgage executed by a married woman upon her separate real estate, to secure her husband's debt, is void as to her; and if she dies intestate, leaving children, they, being her privies, both in blood and estate, may defeat the mortgage by pleading the coverture of their mother, the same as she might if living; but the husband, who joined in the execution

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of the mortgage, and received the benefit thereof, is estopped from making such defence as to his interest in the real estate.

MITCHELL, J., does not concur in all the conclusions stated.

From the Martin Circuit Court.

T. J. Brooks, S. M. Reeve, L. Stephens and J. T. Rogers,
for appellants.

T. M. Clarke and C. S. Dobbins, for appellee.

HOWE, C. J.—This was a suit by appellee, Baker, as plaintiff, against the appellants, John K., Charles J. and Jesse E. Ellis, as defendants. The objects of the suit were the foreclosure of a mortgage, alleged to have been executed to appellee, Baker, on certain real estate in Martin county, on the 9th day of August, 1884, by one Clara A. Ellis, then in full life but since deceased, and appellant John K. Ellis, then the husband of said Clara A. Ellis, and the collection of the debt secured by such mortgage, and evidenced by the promissory note of said John K. and Clara A. Ellis, for the sum of \$650, dated August 9th, 1884, and payable to appellee twelve months after the date thereof. It was alleged by appellee in his complaint (among other things), that the promissory note secured by such mortgage was given for money loaned to said Clara A. Ellis, for her own separate use and benefit, and for the improvement of her separate real estate; that at the time of the execution of such mortgage, said Clara A. Ellis was the owner in fee simple of the mortgaged real estate; that after the execution of such mortgage, to wit, on the — day of —, 1886, said Clara A. Ellis died intestate, leaving appellant John K. Ellis, her husband, and appellants Charles J. and Jesse E. Ellis, her children, as her only heirs at law; and that said Clara A. Ellis left no personal estate to be administered, and no administration of her estate has been granted to any one. Wherefore, etc.

Appellant John K. Ellis separately answered; and the other appellants, who were infants, by their legal guardian, who was also their guardian *ad litem*, answered specially.

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Appellee's demurrers to each of these answers were sustained by the court. Appellants excepted to these rulings, and, failing to amend or plead further, a personal judgment was rendered against said John K. Ellis for the amount due on the note in suit, and a decree was rendered against all the appellants for the foreclosure of the mortgage sued upon, the sale of the mortgaged real estate to satisfy the mortgage debt, etc.

Errors are assigned here by appellants, which call in question the sustaining of appellee's demurrer to their respective answers.

In their separate answer by their guardian *ad litem*, the infant appellants alleged that the note in suit was the note of said John K. Ellis, and said Clara A. Ellis signed such note as his surety; that, on the 9th day of August, 1884, said Clara A. Ellis was a married woman, the wife of appellant John K. Ellis; that the real estate described in the complaint herein, as mortgaged to appellee, was, on said 9th day of August, 1884, and had continued to be since, the sole and separate property of said Clara A. Ellis, except as hereinafter shown, and was a gift from her father, Jesse K. Baker; that, on the — day —, 1886, said Clara A. Ellis died at Martin county, intestate, leaving as her heirs at law these infant appellants and their co-appellant, said John K. Ellis, when the title to the two-thirds part of such real estate was cast upon these infant appellants, and the only title or interest they have in said real estate is by such inheritance; and that repeatedly, before her death, said Clara A. Ellis declared to said John K. Ellis and others, that when an effort should be made to foreclose the mortgage now in suit, she would set up her suretyship and ask to be released from such mortgage and note.

Upon the facts alleged by the infant appellants in their separate answer, admitted to be true by appellee's demurrer thereto, both the note and mortgage now in suit were absolutely void, as to said Clara A. Ellis, who was a married woman

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at the time of their execution. In section 5119, R. S. 1881, in force continuously since September 19th, 1881, it is provided as follows: "A married woman shall not enter into any contract of suretyship, whether as endorser, guarantor, or in any other manner; and such contract, as to her, shall be void." In commenting on this section of the statute, in *Dodge v. Kinzy*, 101 Ind. 102, this court said: "The provisions of this section of the statute are too plain to be misunderstood. They positively forbid a married woman to enter into any contract of suretyship, in any manner, and as positively declare that any such contract, as to her, shall be void."

Accordingly, we have uniformly held, where no question of fraud or estoppel has intervened, that any contract of suretyship, whatever may be its form, entered into by a married woman since the 19th day of September, 1881, was, under the provisions of such section 5119 above quoted, as to such married woman, absolutely and wholly void. *Allen v. Davis*, 101 Ind. 187; *Warey v. Forst*, 102 Ind. 205; *Brown v. Will*, 103 Ind. 71; *Engler v. Acker*, 106 Ind. 223; *McLead v. Aetna Life Ins. Co.*, 107 Ind. 394; *Bennett v. Mattingly*, 110 Ind. 197; *Crooks v. Kennett*, 111 Ind. 347; *Bartholomew v. Pierson*, 112 Ind. 430; *State, ex rel., v. Kennett*, 114 Ind. 160.

But it is claimed that the answer under consideration was bad upon demurrer, because the initial fact in the defence pleaded therein was the coverture of said Clara T. Ellis at the time she executed the note and mortgage sued on; and coverture, it is said, is a personal defence, which a married woman may, or may not, use for her own protection, but which can not be pleaded by third parties for their own benefit. Doubtless it is true, as a general rule, under our decisions, that coverture is a personal defence, and is not an available defence for other parties. *Aetna Ins. Co. v. Baker*, 71 Ind. 102; *Bennett v. Mattingly*, *supra*; *Crooks v. Kennett*, *supra*. But, upon the facts stated in the answer of the infant appellants,

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this general rule can have no application to the case we are now considering. While yet a married woman, Clara A. Ellis died intestate, the owner of the mortgaged real estate. At her death, the title to two-thirds of such real estate was cast by descent upon her two children, the infant appellants. Their mother being dead, they are not, as to her, either third parties or other parties, within the meaning of those expressions in the cases last cited. They are her privies, both in blood and estate. Figuratively speaking, they stand precisely in her shoes, and have the right to avail themselves of any defence which, if living, she might have pleaded, including the defence founded upon her coverture.

For the reasons given we are of opinion that the court below erred in sustaining appellee's demurrer to the separate answer of the infant appellants herein. In his separate answer to so much of appellee's complaint as sought to foreclose the mortgage described therein, appellant John K. Ellis alleged that he was the owner of the undivided one-third part of the mortgaged real estate by inheritance from his deceased wife, Clara A. Ellis, and in no other manner; that, on the 9th day of August, 1884, said Clara A. Ellis was a married woman, and then owned said mortgaged real estate as her separate property, and had acquired her title thereto by gift from her father; that said Clara A. Ellis executed the mortgage sued upon to secure the note in suit, as security for her husband, said John K. Ellis, which said note was given for her husband's debt, and not for her own, nor for the benefit of her separate estate; and that, on the — day of —, 1886, said Clara A. Ellis died intestate, at Martin county, leaving appellant John K. Ellis, her husband, and his co-appellants, her children, surviving her. Wherefore appellant John K. Ellis demanded judgment that his title to such real estate be quieted against appellee's mortgage.

We are of opinion that the facts stated by John K. Ellis, in his separate answer herein, are wholly insufficient to show

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that he is entitled to the relief he demanded, or to any other relief in a court of equity.

It is apparent from the record of this cause that, upon the faith of the note and mortgage in suit, executed by said John K. Ellis, he procured from appellee the large sum of \$650; and it does not appear that he has ever repaid, or tendered back, or offered to repay or tender back, the sum of money thus procured. Yet, appellant John K. Ellis, with appellee's money so procured in his pockets, or, at least, unaccounted for, has come into a court of equitable cognizance, and, in his answer or counter-claim, has asked such court to quiet his after-acquired title to the real estate against the mortgage thereon, which he had executed, and upon the faith of which mortgage, so executed, he had become possessed of appellee's money.

There is an old rule in equity, so old that the memory of living man "runneth not to the contrary," and so manifestly just that it has become a maxim, that he who seeks the aid of a court of equity must show that he has done, or offered to do, what equity and good conscience required him to do in the premises. Applying this rule to the case in hand, it is certain that appellant John K. Ellis has no standing in a court of equity to plead the matters stated in his answer, or to demand the equitable relief he asked for therein. By his joinder in the execution of the mortgage sued on, and upon the facts stated in his answer, we are of opinion that appellant John K. Ellis is conclusively estopped from claiming or asserting that such mortgage is void as against him, or as against his interest in the mortgaged real estate. Appellee's demurrer to the separate answer of appellant John K. Ellis was correctly sustained.

As the judgment must be reversed for the error of the court in sustaining the demurrer to the separate answer of the infant appellants, we think the interests of all the parties, appellee as well as the appellants, will be subserved by the reversal of the entire judgment.

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The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrer to the answer of defendants Charles J. Ellis and Jesse E. Ellis, and for further proceedings not inconsistent with this opinion.

MITCHELL, J., does not concur in all the conclusions stated in the foregoing opinion, but agrees that the judgment below must be reversed.

Filed Dec. 21, 1888.

No. 13,141.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY
COMPANY v. FINNELL ET AL.

SPECIAL VERDICT.—*Improper Matter.*—*Venire de Novo.*—It is the office of a special verdict to find the facts. Evidence or conclusions of law inserted therein will be disregarded, and if, stripped of improper matter, the verdict is yet sufficient to support a judgment either way under the issues, a motion for a *venire de novo* will not lie.

SAME.—*Defective Verdict.*—*Motion for New Trial.*—If a special verdict fails to find facts established by the evidence, or finds facts not established, the remedy is by a motion for a new trial, and not by a motion for a *venire de novo*.

RAILROAD.—*Right of Way.*—*Deed.*—*Acceptance.*—*Estoppel.*—Where a railroad company, in pursuance of a contract with a land-owner, demands and accepts and places upon record a deed for a right of way, it can not afterwards object to the sufficiency of the deed, or question the authority of the person making the contract.

SAME.—*Consideration for Deed.*—*Contemporaneous Parol Contract.*—Where, contemporaneously with the execution and acceptance of a deed to a right of way, the parties orally agree that the consideration for the deed is the payment of a certain sum of money by the railroad company, and the performance by it of certain conditions, within a reasonable time, the railroad company is liable according to the terms of that

116	414
190	378
190	430
191	304
191	350
116	414
195	191
116	414
141	545
116	414
144	607
116	414
180	518
180	520
116	414
168	603

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contract (which is assumed to be valid, as the question is presented), and a prior written contract between it and the land-owner becomes immaterial.

From the Marion Circuit Court.

C. W. Fairbanks, J. A. New and E. Jacoby, for appellant.
L. H. Reynolds, M. Moores and C. G. Offutt, for appellees.

ZOLLARS, J.—It is charged in appellees' complaint that, in consideration of a grant by them to the railway company of a strip of land upon which to construct and operate its road, that corporation agreed to pay to appellees \$500, fence the way so granted on both sides through their land, and build two farm crossings for their convenience. It is further charged that the railway company has failed and refused to build and construct the fences and farm crossings.

The purpose of this action is to recover the damages which, it is averred, resulted from the breach of the contract on the part of the railway company.

The jury returned the following special verdict:

"We, the jury, having been directed by the court, at the request of the plaintiffs herein, to return a special verdict in writing, upon all the issues in the above entitled cause, do find specially the following facts, that is to say:

"1. On May 18th, 1881, the defendant was, and still is, a railroad corporation, organized and existing under and by virtue of the laws of the States of Ohio, Indiana and Illinois, and being desirous of surveying, locating and constructing a railroad from the city of Indianapolis, Indiana, to the city of Springfield, Ohio, and through and across lands of the plaintiffs, situated in Hancock county, Indiana, and described as follows, viz., the southwest quarter, section numbered three (3), in township sixteen (16) north, of range numbered seven (7) east, of which lands the plaintiffs then were the owners in fee simple, the defendant, with the plaintiffs, entered into a written contract, which contract was executed, acknowledged and delivered by plaintiffs to the de-

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fendant, and was accepted by the defendant, and was in the words and figures as follows, to wit:

“ ‘ This agreement, made and entered into between James S. Finnell and Elizabeth A. Finnell, his wife, of the county of Hancock and State of Indiana, of the first part, and the Indiana, Bloomington and Western Railway Company, a corporation existing under and by virtue of the laws of the States of Ohio, Indiana and Illinois, of the second part, witnesseth: That,

“ ‘ Whereas the said party of the second part is desirous of surveying, locating and constructing a railroad from the city of Indianapolis, Indiana, to the city of Springfield, in the State of Ohio, and it is rendered probable that said railway may be finally located over the lands of the party of the first part, situated in the county of Hancock, in the State of Indiana, and described as follows: The southwest quarter, section numbered three (3), in township numbered sixteen (16) north, of range seven (7) east; said company to fence said road where the same passes over said land, within a reasonable time after the same is completed, and to put in two farm crossings on said land.

“ ‘ And whereas it is considered that if the said road is built over the land of the parties of the first part, above described, said road will greatly benefit and enhance the value of the same.

“ ‘ Now, in further consideration of the sum of one dollar, to us in hand paid by said company, receipt whereof is hereby acknowledged, we do hereby agree and by these presents bind ourselves, our heirs, executors, administrators and assigns, that if the line of railway of said Indiana, Bloomington and Western Railway Company shall be finally located over the said above described land within the time fixed by its charter, to make, or cause to be made, to said company, as soon as said line of railway shall be located, a good and sufficient deed, clear of all encumbrances, for a strip of said land fifty feet wide on each side of the center stake or center line of

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said railway, as located, and that the said company may at any time enter upon and use said land for the purpose of locating, building, operating and maintaining said railway.

“And it is further agreed that said company shall, upon the delivery of said deed, pay to the party of the first part the sum of five hundred dollars as a further consideration for the said land.

“In witness whereof the parties of the first part have hereunto set their hands and seals, this 18th day of May, 1881.

“JAMES S. FINNELL. [Seal.]

“ELIZABETH A. FINNELL. [Seal.]’

“To said contract was and is attached a certificate of acknowledgment in the words and figures following, to wit :

“STATE OF INDIANA,

“HANCOCK COUNTY, ss.:

“Before me, William C. Barrett, a notary public in and for said county, this 18th day of May, A. D. 1881, personally appeared the within named James S. Finnell and Elizabeth A. Finnell, his wife, and acknowledged the execution of the annexed instrument.

“Witness my hand and notarial seal, this 18th day of May, A. D. 1881.

WILLIAM C. BARRETT,

“Notary Public.”

“Said contract was delivered by plaintiffs to one Albert Emerson, an authorized agent of defendant, and was accepted and placed of record by defendant upon the 25th day of May, 1881, in the recorder’s office of Hancock county, Indiana.

“2. On June 22d, 1881, defendant demanded of plaintiffs, who then were, and now are, husband and wife, a warranty deed to a strip of land through plaintiffs’ said land, pursuant to said contract, and plaintiffs being, upon said day last named, still the owners in fee simple of said real estate, and in possession of the same, executed, acknowledged and delivered to the said defendant a deed of general warranty to a strip of land one hundred feet in width, being fifty feet wide on each

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side of the center stakes or center line of said railway, as located, which land then was free and clear of all encumbrances, and was accepted by defendant as a complete execution and fulfilment by the plaintiffs of said contract of sale. Said deed was caused by the defendant to be recorded in the office of the recorder of Hancock county, Indiana, and contained a correct description of the land now occupied by defendant for its right of way through said real estate and of land which was then and there turned over to defendant by plaintiffs, and was accepted by said defendant and occupied as and for its right of way.

“3. At the time of the execution and acceptance of said deed, it was understood and agreed by the parties thereto, by an oral agreement contemporaneous therewith, that the consideration for said deed was the sum of five hundred dollars in money, and a good and sufficient fence upon both sides of said right of way where the same should, and did, cross plaintiffs’ said land, with two farm crossings upon said land; such fence and farm crossings to be constructed within a reasonable time after the completion of the said railroad by defendant, and at defendant’s expense, which fence and farm crossings were a part of the agreed consideration for said deed, and the purchase and sale of said right of way.

“4. Defendant has surveyed, located and constructed, and now operates, a line of railway diagonally across plaintiffs’ said land, and has appropriated to its own use a considerable portion of said land; said line of railway, between Indianapolis, Indiana, and Springfield, Ohio, was fully completed June 1st, 1882, and has been in operation since August 1st, 1882, since which time defendant has been running its locomotives and cars over said line of railway, and upon and across said land conveyed by plaintiffs to said defendant.

“5. After a reasonable time had elapsed after the completion of said road, and before this suit was brought, plaintiffs demanded of defendant that defendant construct a fence and farm crossings between said right of way and plaintiffs’

The Indiana, Bloomington and Western Railway Co. v. Finnell *et al.*

said land, but the defendant wholly failed, neglected and refused to construct said fence or farm crossings for plaintiffs, and defendant has given plaintiffs nothing in lieu of such fence and farm crossings, and plaintiffs have not waived or relinquished their claim for such fence and farm crossings.

"6. Said written contract was entered into by plaintiffs with defendant through one Albert Emerson, who was then in the employ of said defendant, and who had a general authority from the defendant to purchase for the defendant such lands in Hancock county, Indiana, as he thought necessary for defendant's right of way, from the different land-owners along the proposed line of said road. The written contract, made by defendant with plaintiffs, was made by said Emerson, in his capacity as agent for defendant for the general purchase of the right of way for defendant, and said Emerson did not exceed his authority in making said contract, and his act as such agent, in making such contract, was ratified by the defendant.

"7. At the time this suit was brought, the necessary cost of properly preparing the land for the erection of a fence along the right of way was sixty dollars.

"8. At the time this suit was brought, the cost of erecting a good and sufficient fence enclosing the said right of way, and its value when erected, was four hundred and fifty dollars.

"9. At the time this suit was brought, the cost of putting in two farm crossings and necessary gates, and their value, was thirty dollars.

"10. If, upon the facts found above, the plaintiffs are entitled to recover, we, the jury, find for the plaintiffs, and assess their damages at five hundred and forty dollars.

"WILLIAM KERR, Foreman."

The railway company, by its attorneys, moved for a *venire de novo*. That motion was overruled, and judgment rendered for the plaintiffs, appellees here.

The argument by counsel for appellant is confined to the

The Indiana, Bloomington and Western Railway Co. v. Finnell *et al.*

alleged error of the court below in overruling the motion for a *venire de novo*. They contend that that motion should have been sustained for the reason that the special verdict is made up in part of conclusions of law, which should be disregarded in passing upon its sufficiency, and that when they are eliminated there is not enough left upon which to predicate a judgment.

It is well settled in this State, that it is the office of a special verdict to find the facts, and not the evidence or conclusions of law. It is, also, as well settled, that it does not follow that because a special verdict may contain evidence, conclusions of law, facts without the issues, or fails to find facts proven, a motion for a *venire de novo* must be sustained. Matters thus improperly found will be disregarded. But if, stripped of those matters, the verdict is yet sufficient to lead to and support a judgment either way under the issues as made by the pleadings, a motion for a *venire de novo* will be overruled. If such a verdict fails to find facts established by the evidence, or finds facts not established by the evidence, the remedy is by a motion for a new trial, and not by a motion for a *venire de novo*.

One of the points made in argument is, that if the conclusions of law be eliminated from the finding upon that subject, there will not be sufficient left to show that appellees executed and delivered a deed for the land, as stipulated in the written agreement upon which they, in part, at least, rely. In the second finding it is stated that, on the 22d day of June, 1881, the railway company demanded of plaintiffs a warranty deed for a strip of land, pursuant to the contract; that they executed, acknowledged, and delivered to the railway company a deed of general warranty for a strip of land; that the deed was accepted by the railway company as a complete execution and fulfilment of the contract by the plaintiffs, and that it caused the deed to be recorded. It is further shown by that finding, in connection with the fourth, that

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the railway company took possession of the strip of land described in the deed and constructed its road thereon.

It is thus clearly shown that the railway company accepted the deed as tendered, and constructed its road upon the land therein described. It is a matter of no consequence, therefore, whether or not the jury might find as a fact that the deed was a warranty deed; nor, indeed, is it material whether the deed was a warranty deed or not. By the acceptance of it as shown, the railway company must be held to have regarded it as sufficient. See *Louisville, etc., R. W. Co. v. Sumner*, 106 Ind. 55 (62).

It is further contended that all of the findings that Emerson was an agent of the railway company, with authority to purchase lands upon which to construct the road, are conclusions of law, and should be disregarded, and that when those conclusions are eliminated there is nothing left to show that the railway company was represented by any one who had authority to represent it in the making of the written contract set out in the special findings.

The conclusion we have reached as to the verdict as a whole, renders it unnecessary for us to decide as to whether or not the findings as to Emerson's agency and authority are conclusions of law. Similar questions have been involved and decided in former cases, and a further discussion is not necessary here.

It is stated in the second finding that the railway company demanded a deed from appellees pursuant to the written contract. It is plain enough that in the making of that demand the railway company was represented by some one with the proper authority, because the deed was accepted and placed upon record, and the land was taken possession of and the road constructed upon it.

The demand by the railway company for the deed "pursuant to said contract," indicates pretty strongly a knowledge on the part of the railway company of the terms of the writ-

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ten contract, and a ratification of all that had been done by Emerson in the execution of it.

We place our decision, however, more especially upon the third finding. It is therein stated, as will be observed, that at the time of the execution and acceptance of the deed from appellees, it was understood and agreed by the parties thereto, by an oral, contemporaneous agreement, that the consideration for said deed was the sum of \$500 in money, and the building and construction by the railway company, within a reasonable time after the completion of the road, of fences on each side thereof through appellees' land, and two farm crossings.

No question is made, or could be made here, as to whether or not that contract should have been in writing, nor as to whether or not it is in any way in conflict with the terms of the deed.

The terms of the deed are not set out in the special findings, and we can not look from them to the evidence in search of a fact upon which a legal question might by some possibility be made to hinge. If any question could, in any event, be made as to the contract not being in writing—a question which counsel have not made here, and which we do not decide, and in relation to which we indicate no opinion—the time to make it had passed when the verdict was reached. In passing upon the verdict, we must assume that the evidence establishing the oral contract was admitted without objection, and treat the contract as valid and obligatory upon the parties. As bearing somewhat upon the question under discussion, see *Stockwell v. State, ex rel.*, 101 Ind. 1 (14 and 15).

The third finding, in connection with the second, shows clearly enough that the oral contract was made with the railway company, because it shows that it was made at the time the deed was demanded and accepted, and we have determined that it is sufficiently shown that the deed was demanded and accepted by a proper representative of the railway company.

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When we have determined that the contract made at the time the deed was executed is valid and obligatory, the prior written contract becomes immaterial. Whether the oral contract be treated as a restatement and ratification of the prior written contract, or as a subsequent and independent contract, the railway company is liable in damages for its violation.

It is stated in the fifth finding that the plaintiffs, after the expiration of a reasonable time, etc., made a demand upon the railway company for the construction of the fences and farm crossings.

It is insisted in argument that the finding is defective, because it does not name the person, officer or agent of the railway company upon whom the demand was made. As no argument is made, or authorities cited, to show that such a demand was necessary, no further notice of the finding need be taken. It may not be improper to remark, in passing, however, that the findings show that the construction of the road was completed on the 1st day of June, 1882, and that this action was not commenced until the 21st day of December, 1883.

Other criticisms are made upon the special verdict about which it is not necessary for us to express an opinion. We are not to be understood, however, as commending the verdict as a model finding of facts.

Judgment affirmed, with costs.

Filed Dec. 22, 1888.

Royal v. The Aultman & Taylor Company *et al.*

No. 13,118.

ROYAL v. THE AULTMAN & TAYLOR COMPANY ET AL.

DEED.—Condition Subsequent.—Forfeiture.—Demand.—Judgment.—Judicial Sale.—Injunction.—Waiver.—Estoppel.—The owner of land conveyed it by a warranty deed which contained the condition that the grantee should pay the grantor fifty dollars on the 1st day of March of each year, during the latter's life, on his failure to do which for three consecutive years the grantor might revoke the conveyance and revest the title by repaying the amount received and by placing upon record in the recorder's office a written revocation. The grantee failed to comply with the condition, but while he held title a judgment was taken against him and the land levied upon and offered for sale thereunder. The grantor sets up the foregoing facts, alleges a revocation of the conveyance in the manner stipulated, and asks that the sale be enjoined.

Held, that the plaintiff, upon the facts stated in the complaint, is entitled to an injunction.

Held, also, that a demand upon the grantee for payment was not necessary, he being bound to tender performance of the condition on his part.

Held, also, that if the grantor waived performance, or became in any way estopped to assert a forfeiture, the facts must be made to appear by answer.

From the Fountain Circuit Court.

J. McCabe, E. F. McCabe and I. E. Schoonover, for appellant.

G. W. McDonald, for appellees.

MITCHELL, J.—This was an action by Rebecca Royal against the Aultman & Taylor Company, of the State of Ohio, and Perry Glascock, sheriff of Fountain county, to enjoin the defendants from selling certain real estate alleged to belong to the plaintiff.

It appears from the complaint that, on the 11th day of November, 1881, the plaintiff was the owner of a tract of land in Fountain county, and that she conveyed it by warranty deed to George W. Hyatt on the date above mentioned, subject to certain conditions, which are recited in the deed. The

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conditions were, in effect, that Hyatt should pay to the grantor the sum of fifty dollars on the 1st day of March of each year, for and during the term of her natural life. It was further stipulated that in case Hyatt thereafter failed for the period of three consecutive years to pay the sum of fifty dollars annually, then the grantor might revoke the conveyance by repaying the amount theretofore paid, and by executing and placing upon record in the recorder's office of Fountain county a written declaration revoking the deed. It was further recited in the deed that, upon the making and recording of such declaration, and the repayment of the money paid, the conveyance was to become null and void, and the title was to revert to the grantor.

It is averred that while Hyatt so held the title, the Aultman & Taylor Company recovered a judgment against him, upon which an execution had been issued and placed in the hands of Glascock, as sheriff of Fountain county. It was also averred that the sheriff had levied upon and advertised the land conveyed to Hyatt by the plaintiff, upon the conditions above mentioned, for sale, and that the sale was fixed for the 4th day of April, 1885.

The complaint charged that Hyatt had wholly failed to make any payments as required by the terms of the deed, and that the plaintiff had demanded of him, "more than once a year each year after the date of said deed," that he make payment of the money due her on account of the provisions written in the deed.

It is averred further that the plaintiff, on the 16th day of March, 1885, executed and placed upon record a written revocation of the deed to Hyatt, agreeable to the stipulations therein written. A copy of the deed, and the subsequent revocation thereof, are made part of the complaint.

The only question involved in the present appeal relates to the propriety of the ruling of the court below in sustaining a demurrer to the complaint. It is conceded that the deed created in the grantee an estate upon condition subsequent,

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and that the estate created was liable to be defeated upon the failure of Hyatt to pay according to the condition in the deed. The contention in support of the ruling below is, that inasmuch as by the stipulation in the deed the grantee was required to pay the grantor fifty dollars annually on the 1st day of March, and since it was further stipulated that in case he should fail for three consecutive years to make payment, "then the said Rebecca Royal may revoke this deed," it was therefore necessary in order to render the condition available, that the grantor should have gone upon the land on the 1st day of March each year, and demanded payment of the amount due, and that upon the third successive default, she must *then* have revoked the deed.

In short, the argument is that there could be no forfeiture without making a demand of payment on the day each payment fell due, and that the right of revocation was limited by the word "*then*," so that if it was not exercised immediately after the third consecutive demand and refusal, the right was forever waived. We do not concur in this view.

It is quite true that it may be regarded as in some sense a general rule that a forfeiture can not be insisted upon unless the party entitled to take advantage of the condition first demands performance of that upon which the continuance of the estate depends. *Lindsey v. Lindsey*, 45 Ind. 552; *Cory v. Cory*, 86 Ind. 567; *Ellis v. Elkhart Car Works Co.*, 97 Ind. 247.

This rule applies in the class of cases where the performance of the condition depends upon something to be done by the party entitled to insist upon performance, or upon his election or pleasure, or upon facts or circumstances peculiarly within his personal knowledge. In other words, where it in any way depends on the pleasure of the party for whose benefit the condition is to be performed, in what manner or at what time a thing shall be done, or whether it shall be done at all, the party to be benefited must request performance. *Whitton v. Whitton*, 38 N. H. 127 (75 Am. Dec. 163).

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Where, however, the continuance of an estate depends upon the performance of a specified act, which is to be done at a fixed time, no demand is necessary, because the party bound has equal knowledge of the thing to be done, and of the time when it is to be done. He must, therefore, tender performance at his peril, or make it appear that performance has been expressly waived. *Ellis v. Elkhart Car Works Co.*, *supra*; *Rowell v. Jewett*, 69 Maine, 293; *Whitton v. Whitton*, *supra*; 1 Leading Cases Real Prop. 145.

While a condition may be waived by a party who has the right to avail himself of it, mere indulgence or silent acquiescence in the failure to perform is never construed into a waiver, unless some element of estoppel can be invoked. *Carbon Block Coal Co. v. Murphy*, 101 Ind. 115, and cases cited.

It is apparent that the inducement or consideration upon which the deed in the present case was made, was the agreement of Hyatt to pay the grantor a specified sum of money annually during the period of her natural life.

The estate of the grantee was dependent upon the condition that he pay a certain sum on a fixed date each year, and it was stipulated that in the event of failure for three consecutive years, the conveyance might be revoked, and the estate reverted in the grantor in a specified manner. This agreement was neither unreasonable nor opposed to public policy, nor was it repugnant to the estate created. The parties had, therefore, the right to make it. It was written in the deed, which was presumably in the grantee's possession. It was not necessary, therefore, that there should have been notice, or a demand for payment, in order to apprise the grantee of the thing to be done, or of the time when it was to be done. If there was a waiver of performance, by express agreement, or if the plaintiff is in any way estopped to avail herself of the forfeiture, the facts must be made to appear by answer.

The judgment of the Aultman & Taylor Company was a

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general lien on the actual interest of Hyatt in the real estate in question. It can not stand in the way of the enforcement of whatever rights the plaintiff may have had as against her grantee.

The complaint stated facts sufficient to entitle the plaintiff to relief.

The judgment is reversed, with costs.

Filed Dec. 22, 1888.

116	428
126	330
116	428
144	453

No. 13,465.

KAYSER ET AL. v. HODOPP ET AL.

DECEDENTS' ESTATES.—*Widow.—Election to Take Under Will.—Promissory Note Given for Husband's Debt.—Consideration.*—A widow who elects to take under her husband's will instead of under the law, takes the property devised to her subject to sale, if necessary for the payment of the husband's debts; and a note executed by her to secure the payment of a debt of her husband, which is a charge upon the property devised, is supported by a sufficient consideration, and may be enforced, notwithstanding subsequent proceedings releasing the widow from her election.

From the Ripley Circuit Court.

J. G. Berkshire and *C. H. Willson*, for appellants.

NIBLACK, J.—Suit by August Kayser and Frederick Hagner, partners, doing business under the firm name of Kayser & Hagner, against Mary A. Hodopp and Anthony Sauer upon a promissory note.

There was an answer in one paragraph, setting up special matters in defence, to which a demurrer was overruled, and upon which issue was afterwards joined.

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A trial by the court terminated in a finding and judgment for the defendants, and error is assigned upon the overruling of the demurrer to the answer and upon the refusal of the court to grant a new trial.

The following facts were established at the trial. Charles Hodopp died testate in Decatur county, in this State, on the 26th day of October, 1884, leaving the defendant Mary A. Hodopp as his widow, and after having devised and bequeathed to her all of his property, both real and personal, which might remain after his debts and funeral expenses were paid. His will was admitted to probate soon after his death, and his widow elected to take under the will, proceeding afterwards to settle up the estate without procuring letters testamentary or of administration to be issued upon it. At the time of his death the decedent was indebted to the plaintiffs in the sum of \$267.85 upon an open account. On the 16th day of December, 1884, an agent of the plaintiffs called to see Mrs. Hodopp concerning this indebtedness, and demanded either payment or the execution of a note to secure its ultimate payment, proposing at the same time to take a note with security, payable in one year, with interest from date. Mrs. Hodopp, accepting this proposition, executed the note sued on accordingly, and procured her co-defendant to sign it, also, as her surety only. After this she sold some of the personal property bequeathed to her and collected some money on debts due to the decedent's estate, and from money thus realized she paid the funeral expenses and ordinary debts against the estate, amounting in the aggregate to several hundred dollars. In June, 1885, a remaining creditor of the estate procured the appointment of one Rohr as administrator, with the will annexed, to whom Mrs. Hodopp turned over nearly all the personal property remaining in her possession, and the receipts taken by her for the funeral expenses and the other debts against the estate paid by her. In September, 1885, in certain proceedings taken by her in the Decatur Circuit Court the election of Mrs. Hodopp to take under the

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will was declared to be void, and ordered to be set aside and held for naught upon condition that she should account to Rohr, the administrator, for the sum of five hundred dollars, the amount estimated to have been collected and appropriated by her while the assets of the estate were in her possession. But at the time of the trial of this cause she had not fully accounted to Rohr for that amount, and the estate still remained unsettled.

These facts, first as set up by the answer and as afterwards established by the evidence, were held to be a good defence to the action, upon the assumption, as counsel assure us, that the note was thereby shown to have been executed without any good or valid consideration.

That assumption can not be maintained. A widow who elects to take under her husband's will instead of under the law, takes the property devised or bequeathed to her subject to sale, if necessary for the payment of the husband's debts, and a note executed by her to secure the payment of a debt of her husband, which is thus a charge upon the property devised or bequeathed to her, has the support of a good and sufficient consideration. Both of these propositions rest upon well recognized general principles, and are either directly or inferentially supported by our own decided cases. *Smith v. Baldwin*, 2 Ind. 404; *Millard v. Porter*, 18 Ind. 503; *Henry v. Ritenour*, 31 Ind. 136; *Young v. Pickens*, 49 Ind. 23; *Moncrief v. Moncrief*, 73 Ind. 587; *Crowder v. Reed*, 80 Ind. 1; *Baker v. Griffitt*, 83 Ind. 411; *Cole v. Lafontaine*, 84 Ind. 446; *Rogers v. Zook*, 86 Ind. 237; *Miller v. Buell*, 92 Ind. 482.

After Mrs. Hodopp elected to take under the will, she had the further election of either paying the debts and charges against her husband's estate, or of assuming to pay such debts and charges, and of thus releasing the property devised and bequeathed to her, or permitting the property to be sold and the proceeds to be applied in payment of those debts and charges.

Morrison v. The Board of Commissioners of Shelby County.

As applicable to the debt due to the plaintiffs, she adopted the first alternative, by assuming the debt and making it her own, and the note having been thus executed upon a valid consideration, was not affected by the subsequent proceedings of the Decatur Circuit Court purporting to release her from her election to take under the will, and this would have been equally so if the condition imposed by that court had been fully complied with before the commencement of this suit.

The court below, consequently, erred in overruling the demurrer to the answer as well as in denying the motion for a new trial.

The judgment is reversed, with costs, and the cause is remanded for further proceedings.

Filed Jan. 3, 1889.

No. 13,418.

MORRISON v. THE BOARD OF COMMISSIONERS OF SHELBY COUNTY.

NEGLIGENCE.—County.—Public Bridge.—Knowledge of Dangerous Condition.
—Contributory Negligence.—One who drives upon a public bridge, knowing it to be out of repair and dangerous, and in such a condition that a prudent person might reasonably anticipate injury, is guilty of such contributory negligence as will defeat an action against the county for damages, although the bridge was being used by the public and he exercised care in going upon it.

From the Shelby Circuit Court.

E. H. Chadwick, for appellant.

E. K. Adams and *L. J. Hackney*, for appellee.

116	431
147	331

116	431
180	275

Morrison v. The Board of Commissioners of Shelby County.

MITCHELL, J.—Morrison filed a claim against the board of commissioners of Shelby county for damages alleged to have been sustained by him on account of the defective condition of a public bridge, which he alleged the county had negligently permitted to become ruinous and in a dangerous condition, and through which he charged that one of his horses had fallen.

The claim was disallowed, whereupon an appeal was taken to the circuit court, in which there was a finding and judgment for the board of commissioners. It is now insisted that the judgment of the circuit court ought to be reversed, because the finding is contrary to the evidence.

The record shows that the plaintiff admitted that he knew the condition of the bridge, when he drove upon it with his team, and that he had knowledge that it was out of repair and dangerous for more than a year prior to the time his horse broke through. One end of the bridge was higher than the other. The northwest corner was lower than the southeast corner, the pillars having sunken into the ground, giving the bridge a peculiar inclination on the sides. He knew the boards were loose and travel-worn, and he admitted that he had refrained from using the bridge some time before the accident, on account of its ruinous condition.

It will thus be seen that it fairly became a question for the court trying the cause to determine whether or not the plaintiff was guilty of contributory negligence in venturing upon the bridge with his team drawing a loaded wagon, with knowledge of the condition of the structure. It is quite true he testified that he exercised great care and caution in driving upon the bridge, which he says was being used by the public, and that he believed he could pass over it in safety. While this is true, it is also to be remembered that one who voluntarily goes upon a structure, with full knowledge of its dangerous condition, and of the perils attending the venture, will be deemed to have done so at his own risk. *Forks Tp. v. King*, 84 Pa. St. 230; Whart. Neg., section 400.

Cunningham v. The State.

The law accounts it negligence for one, unless under compulsion, to cast himself upon a known peril, from which a prudent person might reasonably anticipate injury. *Town of Gosport v. Evans*, 112 Ind. 133; *Lake Shore, etc., R. W. Co. v. Pinchin*, 112 Ind. 592; *Riest v. City of Goshen*, 42 Ind. 339; *Jonesboro, etc., T. P. Co. v. Baldwin*, 57 Ind. 86; *Evansville, etc., R. R. Co. v. Crist, post*, p. 446.

There was evidence tending to support the finding of the court.

The judgment is affirmed, with costs.

Filed Jan. 4, 1889.

No. 14,280.

CUNNINGHAM v. THE STATE.

RECOGNIZANCE.—*Execution of.*—*Waiver of Objection to Prior Proceedings.*—

Forfeiture.—Where the circuit court, of its own volition, assuming that a debtor has committed perjury in his examination in proceedings supplementary to execution, makes an order that, in default of bail, he shall be committed to jail to answer to that charge at the next term of court, and in pursuance of the order the debtor enters into a recognizance with surety for his appearance, without in any way questioning the legality of the order, all objections thereto are waived, and its invalidity can not be set up as a defence to an action on the recognizance.

From the St. Joseph Circuit Court.

A. Anderson, for appellant.

L. T. Michener, Attorney General, A. L. Brick, Prosecuting Attorney, J. H. Gillett and L. Hubbard, for the State.

Howk, J.—This was a suit by and in the name of the State
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of Indiana, as plaintiff, against Eliza Cunningham, appellant, and one Andrew Cunningham, as defendants, upon a forfeited recognizance.

The State's complaint contained two paragraphs, to each of which appellant's separate demurrer, for the alleged insufficiency of the facts therein stated to constitute a cause of action, was overruled by the court. The cause was then submitted to the court for trial, and a finding was made for the State in the sum of \$1,000, and over appellant's motion for a new trial the court rendered judgment accordingly.

In this court appellant, Eliza Cunningham, has assigned errors which call in question the overruling of her separate demurrers to each paragraph of the State's complaint, and her motion for a new trial. In his brief of this cause appellant's learned counsel relies for the reversal of the judgment below upon the alleged error of the court in overruling the demurrer to the second paragraph of the complaint. Counsel concedes, as we understand him, that the evidence in the record fully sustains the facts averred in the second paragraph of complaint; and that, if such facts are sufficient to constitute a cause of action in favor of the State, the judgment below ought to be affirmed, otherwise, counsel earnestly insists, that such judgment must be reversed. The question presented for our consideration and decision, therefore, may be thus stated:

Does the second paragraph of the complaint herein state facts sufficient to constitute a cause of action?

In such second paragraph of complaint the State alleged that on the 22d day of June, 1887, defendant Andrew Cunningham was defendant in a civil cause pending in the St. Joseph Circuit Court, in this State, wherein the Gutta-Percha Paint Company was plaintiff, and was then and there sworn as a witness and gave his testimony in said cause, on the trial thereof in such court; that, upon hearing the testimony of said Andrew Cunningham on the trial of said cause and

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when he had given and furnished his testimony, the court made an order, in substance, as follows:

"State of Indiana v. Andrew Cunningham.

"Now, it appearing to the court, on the trial of the cause of the *Gutta-Percha Paint Company et al. v. Andrew Cunningham et al.*, that it is probable that said Andrew Cunningham is guilty of perjury in his examination in proceedings supplementary to execution, before the judge of the court, in January, 1886. It is therefore ordered that said Andrew Cunningham be committed to the jail of this county to answer the charge of perjury, at the next term of this court, in default of bail. It is further ordered that the bail of said Andrew Cunningham be fixed at the sum of one thousand dollars, and that he give his recognizance in that sum to the sheriff, with surety to be approved, and, in default thereof, that he be committed to the jail of said county until discharged by law."

The State further averred that said Andrew Cunningham was duly arrested by the sheriff of St. Joseph county on such order, and, to procure his release from imprisonment, executed his recognizance, with defendant Eliza Cunningham as his surety, conditioned that he would appear at the first day of the next term of said court, to wit, at its October term, 1887, to answer said charge and abide the judgment of the court; that said recognizance was accepted and approved by said sheriff, and defendant Andrew Cunningham was released from custody, and said recognizance was duly certified to and filed in the office of the clerk of said court, and recorded; that defendant Andrew Cunningham appeared on the first day of such next term of said court, and the grand jury thereof proceeded to the examination of such charge, and duly found an indictment against said defendant at said October term, 1887, and duly returned the same into the St. Joseph Circuit Court, at said term thereof, which indictment charged said defendant with the crime of perjury; that said defendant failed to appear or plead to said indictment, but

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absented himself from the State, and had not since appeared; that said defendant was duly called, but made default, and said recognizance was duly forfeited by the court, and the forfeiture thereof duly entered of record; and that no part of such recognizance had been paid. Wherefore, etc.

Upon the facts stated in the foregoing paragraph of complaint, admitted to be true by appellant's demurrer thereto, and fully established by the evidence, it is earnestly contended by her counsel that the order of the court below, under which Andrew Cunningham was arrested and held by the sheriff of St. Joseph county, was absolutely void and of no effect, and that, therefore, the recognizance in suit, given by him with appellant as his surety to secure his discharge from such arrest, was also void and of no binding force.

Counsel thus states the question which, he claims, is presented for decision by the record of this cause, namely: "Has the circuit court in this State the right or power, of its own volition, without any complaint or charge having been made or preferred, to order a citizen to be arrested and imprisoned in the county jail for a period of three months, or until the ensuing term of court, to answer some charge which, in the opinion of the court, may thereafter be preferred against him?"

If counsel were correct in claiming that the question quoted is presented by the record, we should have little or no hesitancy in answering it, as counsel does, in the negative. We are of opinion, however, that the record of this cause presents no such question for our decision.

Whether the court below had, or had not, the right or power to make the particular order, in all its details, under which Andrew Cunningham was arrested and imprisoned, or whether such arrest and imprisonment, in their inception, were, or were not, legal and valid, it is certain, we think, that he had the right and power to waive all defects, errors and illegalities in such proceedings, or any of them. That is substantially what Andrew Cunningham did, as shown by the

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record now before us, when he and appellant, as his surety, executed the recognizance sued upon herein.

It nowhere appears in the record of this cause that Andrew Cunningham or appellant objected or excepted to any of the proceedings of the court which preceded and led to their execution of the recognizance in suit, and the subsequent adjudication of forfeiture thereof. By their recognizance voluntarily executed, with a full knowledge of all the facts and circumstances connected with the arrest and imprisonment of Andrew Cunningham on the charge of perjury, the recognizers, in legal effect, waived all objections thereto, and bound themselves that said Andrew should appear on the first day of the next term of the court below to answer such charge, and abide the judgment of such court.

After the execution of such recognizance, it is clear that Andrew Cunningham was held thereby, and not by virtue of the prior order of the court. In the case under consideration, therefore, it is a matter of no moment whatever whether such prior order of the court was legal or illegal, valid or invalid; for the illegality or invalidity of such order would constitute no possible defence to this suit upon the recognizance. *Rubush v. State*, 112 Ind. 107; *Ard v. State*, 114 Ind. 542.

Our conclusion is that the court below did not err in overruling appellant's demurrer to the second paragraph of the State's complaint herein. Nor have we found any error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Sept. 18, 1888; petition for a rehearing dismissed Jan. 3, 1889.

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116	438
121	200
121	329
116	438
137	143
138	614
139	614
116	438
141	67
116	438
145	329
116	438
154	580

No. 14,667.

THE BOARD OF COMMISSIONERS OF SULLIVAN COUNTY v. ARNETT.

COUNTY.—Negligence.—Failure to Keep Bridges in Repair.—Counties are liable for damages resulting from a negligent failure on their part to keep bridges on public highways in repair, without regard to the cost of the repairs.

SAME.—Cost of Repairs.—Duty of Township Trustee.—The duty imposed by section 2892, R. S. 1881, upon county commissioners to keep bridges in repair, and the liability resulting from a breach thereof, are not affected by the act of 1885, making it the duty of township trustees to make repairs when the cost is less than seventy-five dollars.

SAME.—Presenting Claim to Board of Commissioners.—Jurisdiction.—It is not necessary that the plaintiff in an action against a county shall prove that he filed his claim before the board of commissioners prior to bringing the action in the circuit court.

SAME.—Damages.—Elements of.—The amount of money judiciously expended by a plaintiff, and the fair value of his personal services, in endeavoring to cure a horse injured by a defective bridge, are proper elements of damages in an action against the county.

PRACTICE.—Examination of Witness.—Objection to Question.—Statement of What it is Expected to Elicit.—There is no available error in sustaining an objection to a question propounded to a witness, where no statement is made as to what testimony is expected in answer thereto.

ARGUMENT OF COUNSEL.—Reading Instructions to Jury.—Right to be Further Heard.—Where counsel for the defendant read to the jury and comment upon a part of the instructions which the court has determined to give, counsel for the plaintiff in closing the argument may read and comment upon the remaining instructions, without entitling the defendant to be further heard.

From the Sullivan Circuit Court.

J. T. Beasley and A. B. Williams, for appellant.

J. S. Bays, for appellee.

ZOLLARS, J.—Appellee's colt was injured upon and by reason of a defective bridge upon a public highway. The injury resulted in its death.

He instituted this action against the county to recover the

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damages which he claims to have suffered by the loss of his colt. He recovered a judgment below.

Appellant's counsel contend that the county is not liable, for the reason that the bridge might have been repaired for less than seventy-five dollars.

That contention is based upon the 3d section of the act of 1885 (Acts 1885, p. 202), which is an amendment of the 19th section of the act of 1883 (Acts 1883, p. 68), and provides that "If the probable cost of constructing or repairing any bridge shall exceed seventy-five dollars, the township trustee of the township where such proposed bridge or culvert is to be located shall notify the board of commissioners of his county of the necessity of such bridge or culvert, and if in the opinion of the county commissioners the public convenience shall require the building or repairing of such bridge or culvert, they shall cause surveys and estimates thereof to be made, and cause the same to be erected, the trustee of the said township in which is located the said bridge or culvert shall, however, pay from the road fund of the said township seventy-five dollars of the cost of such building or repairs: *Provided, however,* That the county commissioners may, in their discretion, direct the trustee of the said township in which is located such bridge or culvert to proceed with the building or repairing of such bridge or culvert, and appropriate from the county treasury money for the payment of all costs of such building or repairs in excess of seventy-five dollars: *Provided, further,* That if the board of commissioners shall not deem such bridge or culvert of sufficient importance to make an appropriation from the county treasury for the building or repairing thereof, the trustee of the township in which is located such bridge or culvert may appropriate any part of the road tax fund in the township treasury for that purpose, if he shall deem it right and expedient to do so."

It may reasonably be said, as contended by appellee's counsel, that the record does not fairly present the question

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which counsel for appellant insist arises in the construction of the foregoing section of the act of 1885. Very clearly, the pleadings do not present the question.

The evidence shows that the colt was injured by stepping into a hole in the floor of the bridge. Probably it would have cost less than seventy-five dollars to repair the floor at the place where the colt was injured, but it is not shown that such repair was all that was necessary. On the other hand, it is shown that the bridge had been damaged by the falling of a tree upon it some three years before the injury to the colt, and that it finally became impassable, and was abandoned a short time thereafter.

It does not follow that because the stopping of the particular hole in the floor might have prevented the injury to the colt, no other repairs were necessary. As we have seen, other repairs were necessary. To have repaired the floor at the place where the colt was injured would have been but a partial performance of duty. Such repairs to the floor might have prevented the injury to appellee's colt at that particular time, but other property, and perhaps persons, might have been injured by reason of other defects in the bridge. When a bridge is out of repair, and an investigation is made by the township trustee, or by the county board, as to the cost of the needed repairs, the investigation must not stop with some particular defect which may have caused an injury to persons or property.

What would have been the cost of a proper repairing of the bridge is not shown, and hence it can not be determined from the record before us that the case falls within the construction which appellant's counsel put upon the act of 1885, *supra*.

Our judgment, however, is that that act does not exonerate the county, or the board of commissioners, which is the same, from the duties and responsibilities resting upon them in relation to bridges upon public highways. Statutes very similar have been in force for many years.

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The act of 1857, for example, provides that if the estimated cost of the building or repairing of a bridge shall exceed the ability of the road district in which such bridge is to be built, by the application of its ordinary road work tax, to perform, the county commissioners may make an appropriation from the county treasury to build or repair the same. R. S. 1881, sections 2885, 2886.

The act of 1881, in relation to the construction and repair of highways, provided that the superintendent of roads in each township should take charge of all roads, highways and bridges in his township, and cause the same to be kept in as good condition as the prudent use of the means in his hands would permit, etc. R. S. 1881, section 5065.

And so, the act of 1883 provides that the supervisor of roads shall carry into effect all orders of the trustee of the township in which the road district is situated, touching the highways and bridges therein, and keep the same in good repair. Acts 1883, p. 63, section 5.

Section 19 of that act, which, as we have stated, was amended by the act of 1885, *supra*, provided that if the probable cost of constructing any bridge or culvert should exceed fifty dollars, it should be the duty of the township trustee of the township where such proposed bridge or culvert was to be located, to notify the board of commissioners of his county of the necessity of such bridge or culvert, and to state the probable cost of the same, and that if satisfied that the bridge would be of public utility, and would cost fifty dollars or more, the county board should order the bridge to be constructed and paid for out of the county bridge fund.

It seems to have been contemplated by these several statutes, just as clearly as by the act of 1885, *supra*, that the road and township officers should, and shall, exercise a supervision over the bridges in the township and road districts, and construct and repair them when the cost of such construction and repair did not, and does not, exceed a certain

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amount, fixed in the former acts at fifty dollars, and in the act of 1885 at seventy-five dollars; and that when the cost of such construction or repair was, or is, less than the amount named, it should, and shall, be paid out of the township road fund.

If, under the act of 1885, as contended by appellant's counsel, the county is not bound to repair a bridge unless the cost of the same exceeds seventy-five dollars, and is exonerated from liability in all cases where the repairs might have been made for that sum, there is no sufficient reason for the holding that, under the law as it stood before the act of 1885 was passed, it was bound to see to it that all bridges upon public highways were kept in repair, and was liable for damages resulting from its negligent disregard of that duty. The act of 1885 is different from former acts in phraseology, but there is no material difference in substance.

That counties are liable for damages resulting from a negligent failure on their part to keep bridges on public highways in repair, without regard to the cost of such repairs, has been uniformly held by this court for many years. We cite some of the cases: *Board, etc., v. Brown*, 89 Ind. 48; *Board, etc., v. Bacon*, 96 Ind. 31; *Patton v. Board, etc.*, 96 Ind. 131; *Vaught v. Board, etc.*, 101 Ind. 123; *House v. Board, etc.*, 60 Ind. 580; *Board, etc., v. Deprez*, 87 Ind. 509; *Board, etc., v. Legg*, 110 Ind. 479; *Board, etc., v. Emmerson*, 95 Ind. 579.

In some of those cases, especially in the case last cited, and in the cases of *Board, etc., v. Bacon, supra*, *Vaught v. Board, etc., supra*, and *Patton v. Board, etc., supra*, the point was made, as here, that the later statutes in relation to the duties and powers of township and road officers relieved the board of commissioners of the duty of keeping bridges in repair where such repairs would cost less than the amount named in those statutes, and, consequently, relieved it of all liability in such cases.

In each case the point was ruled against the party making

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it. It is not necessary to restate here the reasoning of the court in those cases.

Many of our cases rest upon section 2892, R. S. 1881, which declares, in broad and emphatic terms, that "The board of commissioners of such county shall cause all bridges therein to be kept in repair." The holdings have been, as we hold here, that the later statutes, including the act of 1885, *supra*, in relation to the duties and authority of township and road officers have not overthrown the above section 2892, nor lessened the duties of the board of commissioners in relation to bridges, as therein positively enjoined.

To accede to the contention of appellant's counsel would be to set at naught that section of the statute, and overthrow a long line of cases.

Where a bridge may be repaired for seventy-five dollars or less, a duty to make such repairs seems to be impliedly imposed upon the township officers, as such, especially if they have funds which may be so applied. The board of commissioners must, nevertheless, see to it that all the bridges in the county upon public highways are kept in repair. A neglect on the part of the township trustee will be no excuse for a neglect of duty by the board, so long as section 2892, *supra*, remains in force.

It is said in argument that if that is so, the township trustee, by a neglect of duty, may impose upon the county the cost of repairs which ought to be borne by the township. On the other hand, it may be answered that, upon the theory of appellant's counsel, the township trustee may also throw upon the county a like burden by delaying until the defects in a bridge increase and multiply, so that it will require more than seventy-five dollars to make the necessary repairs.

Whether or not there is any method of adjustment between the county and township where the township officers have neglected to make such repairs to a bridge as they might have made, and the county has been compelled to pay damages, is

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a question not before us for decision, and in relation to which we express no opinion.

With the view of securing the performance of duty on the part of township officers, the Legislature enacted section 2061, R. S. 1881, which provides that if any person who has the official supervision of roads in any road district fail to keep the ways and bridges in his road district in as good repair as the available labor and other means of such district will enable him to do, he shall be fined not more than one hundred nor less than five dollars.

It is further contended in behalf of appellant, that there was no proof upon the trial that appellee had filed his claim before the county board before bringing this action in the circuit court, and that, therefore, there should have been no judgment against the county. We have read the evidence, and think that there was sufficient proof of such filing. Such proof, however, on the part of the plaintiff was not necessary. *Board, etc., v. Leggett*, 115 Ind. 544; *Bass Foundry and Machine Works v. Board, etc.*, 115 Ind. 234.

To several of appellant's witnesses its counsel propounded this question :

"From your knowledge of the bridge and its construction, immediately before and after the accident to plaintiff's colt, please state to the jury whether at the time of the accident the bridge was, or was not, in your opinion, in a reasonably safe condition for travel in the ordinary way by travelers upon the public highway."

There is no available error in the sustaining of the objection by appellee to that question. And one sufficient reason why there is not, without stating others, is, that it was not stated by counsel for appellant what answers the witnesses were expected to make, nor what was expected to be proved by their answers. 1 Works Pr., section 929, p. 605, and cases there cited; *Harter v. Eltzroth*, 111 Ind. 159.

The amount which appellee judiciously expended, and the

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fair value of his personal services in an endeavor to cure the colt after the injury, are proper elements of damages.

As stated in the case of *Watson v. Proprietors of Lisbon Bridge*, 14 Maine, 201, had they proved successful, the defendant would have had the benefit, but as they turned out otherwise, it is but just that it should sustain the loss: See, also, *Gillett v. Western R. R. Corp., etc.*, 8 Allen, 560; *Shelbyville, etc., R. R. Co. v. Lewark*, 4 Ind. 471; also, *City of Terre Haute v. Hudnut*, 112 Ind. 542.

The last point insisted upon for a reversal is the alleged error of the court in refusing to allow the defendant's counsel to close the argument.

The record shows that in advance of the argument the court notified the counsel in the cause that it would give to the jury certain instructions prepared by the court, and also those asked by the defendant. In the opening argument counsel for the plaintiff did not read to the jury nor comment upon any of the instructions. In the argument which followed, counsel for the defendant both read to the jury and commented upon the instructions which they had prepared, and which the court had so determined to give, but did not read to the jury nor comment upon those prepared by the court.

In the closing argument counsel for the plaintiff read to the jury and commented upon those instructions. By reason of that, counsel for the defendant claimed the right to be further heard, and now insist that the court erred in not acceding to that claim.

There is no available error in the court's ruling. In reading to the jury and commenting upon a part of the instructions, counsel for the defendant were doubtless endeavoring to convince the jury that, under the law as they would receive it from the court, the verdict should be for the defendant.

In meeting that argument, counsel for the plaintiff had the right to call to their aid the instructions which the defend-

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ant's counsel had not read. It can not be properly said that in doing so they entered upon a new subject and new argument, in answer to which the other side had a right to be heard.

We have followed the arguments of counsel here in detail, and have found no error for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Jan. 3, 1889.

116 446
116 433
117 306
120 472
122 540
123 500
123 16

116 446
126 39
116 446
128 463

116 446
131 566
132 192

116 446
140 278
143 652
116 446
144 255
147 257

116 446
158 192

116 446
159 240

116 446
171 498

No. 14,417.

THE EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY v. CRIST.

RAILROAD.—Personal Injury.—Contributory Negligence.—Pleading.—A general averment that the plaintiff was without fault, in a complaint to recover damages for a personal injury, makes the complaint good upon the question of contributory negligence, unless the facts specially pleaded clearly show that the plaintiff was negligent.

SAME.—Highway.—Obstruction of.—Knowledge of Danger.—Contributory Negligence.—Where a railroad company has constructed its track along a public highway, which constitutes the only means of ingress and egress from the home of an adjacent land-owner, and has left excavations and embankments in the highway, in violation of its statutory duty to restore it to its former condition, the act of a member of the land-owner's family in using the highway under such circumstances does not of itself constitute such contributory negligence as will defeat a recovery against the railroad company for an injury.

SAME.—Failure to Restore Highway to Former Condition.—Liability for Injury.—A railroad company which has violated its duty to restore a public highway, along which it has constructed its track, to its former condition, so far as it can effect a restoration by the exercise of reasonable care and skill, and has thus created a nuisance, is liable to one who, by

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reason of the obstruction left in the highway, combined with the fright of his horse at a hand-car negligently managed, sustains an injury while rightfully riding upon the highway.

EVIDENCE.--*Speed.*--*Opinion.*—A man who has managed hand-cars, or assisted in their management, may express an opinion as to the rate of speed at which a hand-car was moving on a specified occasion.

SAME.—*Personal Injury.*—*Nature and Effect.*—*Expert Witness.*—A physician, speaking as an expert witness, may testify as to the effect of an injury; so, also, under proper allegations in the complaint, it is competent for the plaintiff to prove the nature and extent of the injury.

INSTRUCTIONS TO JURY.—*Time of Asking.*—*Refusal to Give.*—*Practice.*—The trial court may properly refuse to give instructions asked after the argument has begun.

From the Greene Circuit Court.

J. E. Iglehart and E. Taylor, for appellant.

W. C. Hultz, O. B. Harris and J. S. Bays, for appellee.

ELLIOTT, J.—The complaint of the appellee is in three paragraphs; each avers that the injury for which a recovery is sought was caused by the negligence of the defendant, and that the plaintiff was injured without any fault or negligence on her part. They each contained these allegations: That the appellee lived with her father, who owned land not far from the appellant's railroad; that the only means of egress and ingress was a public highway; that the defendant constructed and built the last described line of railroad across, upon and along said last described highway, for a distance of three-quarters of a mile west from the eastern terminus of said last described highway, and unlawfully, carelessly and negligently failed to construct its line of railroad so as not to interfere with the free use of said highway, and so as to afford security for life and property, in this, that the defendant dug an excavation some six feet deep and fifteen feet wide in the highway for a distance of 150 yards, and piled the dirt from said excavation along the sides thereof, making embankments some nine feet high for the distance of 150 yards, leaving no way for persons to pass along the highway except upon the embankment, with the railroad track between; and that

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the defendant unlawfully, carelessly and negligently failed, and still fails in every particular, to restore the highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises.

The second and third paragraphs each contain these allegations upon the subject of the defendant's negligence:

"That, on the 8th day of October, 1886, this plaintiff was lawfully riding her horse upon the highway, so impaired, eastward to her home; that while she was so riding along it between her home and the western highway running north and south, the defendant's agents approached along said railroad from the east in a hand-car and frightened plaintiff's horse, and knowing the situation of plaintiff, but disregarding their duty, they negligently managed the hand-car, in this, that, after seeing the dangerous situation in which plaintiff was placed, they failed to stop said hand-car, and thereby prevent plaintiff's horse from becoming frightened, and thus prevent plaintiff from being injured; that on account of such negligence and the negligence of defendant in failing to restore the highway to its former state, or in a sufficient manner not to unnecessarily impair its usefulness, or injure its franchises, this plaintiff, without any fault or negligence on her part, was greatly injured."

The first paragraph does not contain the allegations last quoted, but does contain, in addition to those already mentioned, the following averments: That, on account of the defendant's negligence in failing to restore the highway, the plaintiff, "while riding her horse eastward, to her home, upon the highway so impaired, on the 8th day of October, 1886, without any fault or negligence on her part, was thrown from her horse" and injured.

The question whether the complaint shows that there was not contributory negligence on the part of the appellee, can not be decided without first ascertaining and determining what duty the appellant owed the public respecting the highway which it had changed from its former condition, for it is

important to give due prominence to two essential facts: one is, that the plaintiff was in lawful use of a public highway, and the other is, that, for its own benefit, the appellant had changed the highway and negligently failed to restore it to its former condition, thus making its use unsafe and dangerous. Nor can this question be disposed of without giving just effect to the general averment that there was no fault or negligence on the part of the plaintiff. This averment makes the complaint good upon the question of contributory negligence unless the facts specifically pleaded clearly show that the plaintiff was negligent. We concur with appellant's counsel that, ordinarily, the specific facts will control the general averment if they make it clear that there was contributory negligence. *Reynolds v. Copeland*, 71 Ind. 422.

It has, however, long been the rule in this court that, unless the facts specifically stated clearly show that there was contributory negligence, the general averment will rescue the complaint from its assailant.

In the case of *Town of Salem v. Goller*, 76 Ind. 291, it was said: "The allegation that he was without fault, like the general averment of negligence, has a technical significance, and admits proof of any facts tending to show its truth."

The cases are collected in *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196, and it was said: "The rule that the general averment is sufficient has been so long established and so often approved that we should feel bound to adhere to it even if we doubted its soundness; but we think its soundness can be vindicated on principle. It is in the nature of a negative fact, and an averment of such a fact can not be made with the same particularity as an affirmative one. The elementary books, recognizing this, agree that in such case a general averment is ordinarily sufficient. It is evident that any other rule would be practically incapable of enforcement, for a negative fact can seldom be alleged except generally and by way of denial, since any other course would require a process

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of exclusion and elimination that would lead to an almost endless pleading. If the specific facts absolving the plaintiff from fault must be pleaded, then it would be necessary to enumerate every fact that might be considered as tending to charge him with fault, and negative its existence. In some cases this process of enumeration and exclusion would be practically impossible; in others it would lead to a prolixity of pleading that would do no good, but would produce uncertainty and confusion."

The question now in hand comes to us, not as one of evidence, but as one of pleading, and, therefore, as one to be determined under the rule stated. For this reason the cases cited by the appellant which bear upon questions arising on the evidence and on the instructions are not relevant.

Testing the complaint by the settled rule, it must be held to show that the plaintiff was not guilty of contributory negligence, since the specific facts do not clearly negative the general averment. They do not, in truth, negative it in any respect, but, on the contrary, are consistent with it.

The two important facts to which we have referred—the place where the injury was received and the duty of the appellant respecting the highway it had made unsafe—when assigned their due weight, fully and clearly relieve the plaintiff from any imputation of negligence; especially is this so when the facts are considered, as they must be, in connection with the explicit averment of her complaint that she was without fault or negligence.

She was upon a public highway leading from her home, and there she had a right to be. She was, it is true, bound to exercise ordinary care in using the highway, but she was not bound to do more. She was not crossing a railroad track, where the rights and duties of the company and a traveller are reciprocal, but she was upon a public way, which the company had no right to use in operating its road, or to make unsafe.

The action is not, it is to be remembered, to recover for

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injuries received on a crossing, for the complaint proceeds upon a radically different theory. The cases of *Indiana, etc., R. W. Co. v. Greene*, 106 Ind. 279, *Indiana, etc., R. W. Co. v. Hammock*, 113 Ind. 1, and *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31, are not in point, for the reason that they were cases where the injury was received on a crossing, and not cases where the interference with a public highway and a negligent breach of duty caused the injury. Throughout this case this difference runs, exerting all through it a controlling influence. Here the defendant negligently failed to perform a duty imperatively enjoined upon it by positive law.

When we come to consider the question of the appellant's negligence, as we shall presently do, we shall state the nature and extent of that duty; but at this point we need only declare that the complaint avers, and the demurrer confesses, that a statutory duty respecting a public highway was violated, and that this wrong, concurring with another wrong, caused the plaintiff's injury. We do not, of course, decide that the negligent breach of a statutory duty not constituting a wilful tort, would make the defendant liable if the plaintiff's negligence contributed to the injury for which she seeks a recovery; but what we do decide is, that the character of the duty, and the nature of the place where the injury was received, are important factors in the solution of the legal problem.

If it were granted that the plaintiff had knowledge that she would be exposed to some danger in attempting to ride along the highway made unsafe by the defendant's wrong, that fact of itself would not in such a case as this necessarily preclude a recovery. Knowledge is not always a bar to a recovery. It is not a bar in such a case as the present, for the plaintiff was not bound to refrain entirely from using the only highway which gave her access to her home or led from it. We have many decisions upon this general subject. In one of them it was said:

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"The appellant, though he saw the engine, was not bound to anticipate all the perils to which he might be exposed in driving past it, or to refrain absolutely from pursuing his usual course on account of unseen and unknown, though probable, risks. Some risks, such as arise from obstructions in highways, are taken constantly by the most prudent of men, and where, as in this case, the party pursues the usual course, believing it to be safe, he is not guilty of contributory negligence. It was a question for the jury, and by their general verdict they have found upon this point in favor of the appellant, and with it this special finding is not irreconcilable, or necessarily inconsistent." *Turner v. Buchanan*, 82 Ind. 147.

A later case contains this statement of the rule: "It is to be determined from the facts of the case whether the known danger is likely to subject the plaintiff to injury, and if it is, then he must be held guilty of negligence in encountering it. While, therefore, it can not be held that one who does not go out of his way to avoid known danger is not always guilty of contributory negligence, yet it must be held that he is guilty of negligence where he attempts to pass the danger where there is such a probability of injury as would deter a reasonable man from assuming the risk of passing it. If the risk is great, or is such as a prudent person would not assume, then the person who does assume it is guilty of such contributory negligence as will preclude a recovery." *Lake Shore, etc., R. W. Co. v. Pinchin*, 112 Ind. 592.

The principle we assert was applied in a case in all its characteristic features the same as the present; we refer to the case of *Evansville, etc., R. R. Co. v. Carvener*, 113 Ind. 51. There are numerous other cases in our reports asserting this general doctrine. Among them are *City of Huntington v. Breen*, 77 Ind. 29, *Wilson v. Trafalgar, etc., G. R. Co.*, 83 Ind. 326, *Henry County T. P. Co. v. Jackson*, 86 Ind. 111, *Nave v. Flack*, 90 Ind. 205, *City of Indianapolis v. Murphy*,

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91 Ind. 382, and *Louisville, etc., R. W. Co. v. Phillips*, 112 Ind. 59.

In a recent edition of a work of excellent standing it is said: "The fact of using a highway, after obtaining such knowledge, does not necessarily and conclusively establish negligence, contributing to an injury resulting from a defect therein." 1 Shearman & Redf. Neg. (4th ed.), section 101.

In another work it is said that "And an exposure to known danger (is) not always negligence." 4 Am. and Eng. Cyclopædia of Law, 36.

Very many authorities are cited in support of this proposition. To the authorities there collected may be added the later cases of *Pennsylvania, etc., Co. v. Varnau*, 15 Atl. Rep. 624, *Gulf, etc., R. W. Co. v. Gascamp*, 7 S. W. Rep. 227, and *Alabama, etc., R. R. Co. v. Arnold*, 4 So. Rep. 359.

But while it is true that knowledge of danger does not necessarily defeat a recovery, yet in all cases it is an important factor, and in many the character of the knowledge and the nature of the danger may be such as to constitute contributory negligence. If the danger is so near and so great that a prudent man, knowing of its existence, would not assume the hazard of encountering it, then it does constitute such contributory negligence as will defeat a recovery. *Town of Gosport v. Evans*, 112 Ind. 133; *Lake Shore, etc., R. W. Co. v. Pinchin*, *supra*; *City of Richmond v. Mulholland*, *ante*, p. 173; *Eckerd v. Chicago, etc., R. W. Co.*, 30 N. W. Rep. 615; *Fulliam v. City of Muscatine*, 30 N. W. Rep. 861.

It is quite clear that it can not be said in this case that the danger was one which the plaintiff was bound to shun, or assume at her own peril all the risk attending the attempt to pass it. The case is not one of a plaintiff casting himself upon a known danger which a prudent person would not have encountered.

We come now to the question which, as we have seen, is intimately blended with the one we have already discussed, and that is the negligence of the defendant.

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The initial step in the defendant's wrong was the negligent violation of a mandatory statute. Section 3903, R. S. 1881, provides for the construction of railroads, and in prescribing the duties and rights of a railroad company declares that it shall have the right "To construct its road upon or across any stream of water, watercourse, road, highway, railroad, or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises."

This statute prescribes a plain duty. Indeed, the duty existed independent of the statute, but the statute makes it all the more clear and positive. The right to interfere with a highway is coupled with the duty to make it as safe as it was before it was disturbed, or, at least, to use reasonable care and skill to do so. This duty is violated if there is a failure to restore it to its former condition, in all cases where the exercise of reasonable care and skill can effect a restoration. The rule which governs cases of this class is thus stated by a writer of acknowledged accuracy and ability: "Whenever an act is authorized to be done in a highway that would otherwise be a nuisance, the person or company to whom the power is given is not only bound to exercise it strictly within the provisions of the law, but also with the highest degree of care to prevent injury to the persons or property of those who may be affected by such acts. Hence, where a railroad company has been permitted to lay its track along or across a highway, it is bound to the use of every reasonable precaution to prevent injury to those passing along the highway, or crossing its track that is laid along or across the highway; and if it fails to exercise a proper degree of care,—not only such as is provided by statute, but also such as is rendered necessary by the character of the obstruction and its location, having refer-

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ence to a like reasonable exercise of care on the part of those approaching the obstruction,—it becomes a nuisance to the extent of its injury to individual rights, and renders the company liable in damages for all the consequences.” 2 Wood Railway Law, section 271.

Possibly the rule is rather too strongly stated, but, strong as the statement is, many well considered cases give it adequate support. Our own cases recognize and enforce a rule very much the same as that stated by the author from whom we have quoted, although it is, perhaps, not quite so strongly stated. *Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 143; *Louisville, etc., R. W. Co. v. Phillips, supra*; *Evansville, etc., R. R. Co. v. Carvener, supra*.

In the case last cited it was said: “Leaving the highway in such a condition as to require the wheels of vehicles passing over the railroad track to be raised nine inches perpendicularly from the surface of the highway, in order to pass over the top of the rails, was *prima facie* a negligent interference with the free use thereof. *Indianapolis, etc., R. R. Co. v. State, ex rel.*, 37 Ind. 489; *Johnson v. St. Paul, etc., R. R. Co.*, 31 Minn. 283.”

The facts in the complaint before us make a very much stronger case than the one from which we have quoted, and as the injury is shown to have been caused by the condition of the highway, combined with the negligent management of the hand-car, a strong case is made out.

At another place in the opinion from which we have quoted it was said: “A defendant who, in violation of an express statutory duty, places or causes an obstruction in a highway, will not be heard to say that he did not anticipate an injury, which was the direct result of his unlawful act, when the person injured was without fault. *Wabash, etc., R. W. Co. v. Locke*, 112 Ind. 404.”

In harmony with the doctrine declared by the authorities we have cited, is this statement in a text-book: “Where one has a license to interfere with a highway, as where a railroad

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company is authorized to lay its track along, under, or over a highway, the terms of the license, so far as it directs the manner of such interference, must be strictly complied with. Interference in any other mode is a public nuisance." 2 Shearman & Redf. Neg. (4th ed.), section 359.

This statement luminously exhibits the law, for it goes back to the fundamental principle that he who unlawfully interferes with a highway creates a nuisance, and is liable in damages to one who suffers a special injury.

It is established law that a complaint which charges negligence in general terms is good on demurrer. This was proved to be the rule by our own decisions and by other authorities in a case recently decided, that of *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196.

As all of the paragraphs of the complaint contain appropriate allegations charging the defendant with negligently failing to discharge its duty, they are good irrespective of the negligence in running the hand-car. The superadded act of negligence, even if it does not strengthen the complaint, certainly does not weaken it. By showing a second wrong, and combining it with the first so as to form a continuous cause of action, the pleading was, as we believe, strengthened, and not weakened. *Indianapolis, etc., R. W. Co. v. Pitzer*, 109 Ind. 179.

The wrong of the defendant in negligently failing to restore the highway is, as we have seen, of itself sufficient to constitute a cause of action, and the additional act of negligence, in the management of the hand-car, if not considered as adding strength to the complaint, can not, at all events, detract from it; but we think that the fact that the defendant, by its own wrong, rendered the highway unsafe, made it necessary for it in operating its road to exercise care to prevent injury to one placed in danger by that wrong. We are not dealing with a case where the railroad company was not guilty of any breach of duty respecting the highway on which

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the plaintiff was travelling, but with a case where, in violation of a positive duty, it wrongfully interfered with a highway. Here the two wrongs blend in one concurring tort. If the appellant was free from fault respecting the public highway, we add, to prevent possible misunderstanding, we should have an entirely different case, and one in which it may be that no action would lie.

A man who has managed hand-cars, or assisted in managing them, may express an opinion as to the rate of speed at which a hand-car was moving on a specified occasion. Mr. Lawson says that, on questions of speed, "The opinion of an ordinary witness is admissible." *Expert and Opinion Evidence*, 462. The reason for the rule is, that velocity or speed is a subject which can not be placed before a jury by a statement of the observed facts. *Bennett v. Meehan*, 83 Ind. 566 (43 Am. R. 78); *Loshbaugh v. Birdsell*, 90 Ind. 466; *Carthage T. P. Co. v. Andrews*, 102 Ind. 138, *vide op.*, p. 143; *Louisville, etc., R. W. Co. v. Jones*, 108 Ind. 551; *Salter v. Utica, etc., R. R. Co.*, 59 N. Y. 631; *Chicago, etc., R. R. Co. v. Johnson*, 22 Am. L. Reg. (N. S.) 117; *Fulsome v. Town of Concord*, 46 Vt. 133.

Under the allegations of the complaint, it was competent for the plaintiff to prove the nature and extent of her injuries. *Ohio, etc., R. R. Co. v. Hecht*, 115 Ind. 443.

It was entirely proper to permit a physician, speaking as an expert witness, to testify as to the effect of the injury. *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544.

It is not error to refuse instructions asked after the argument has begun. *Bartley v. State*, 111 Ind. 358; *Terry v. Shively*, 93 Ind. 413; *Jolly v. Terre Haute, etc., Co.*, 9 Ind. 417.

We do not doubt the power of the trial court to order a new trial when the verdict is wrong upon the evidence; this court, however, it is hardly necessary to say, will not weigh the evidence to ascertain where the preponderance is, but it

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will accept as trustworthy that deemed so by the jury and the trial court. This rule is applicable here, and makes it our duty to sustain the verdict.

Judgment affirmed.

Filed Jan. 3, 1889.

No. 14,564.

HORNUNG v. THE STATE, EX REL. GAMBLE.

COUNTY SUPERINTENDENT.—*Election by Trustees.*—*Trustee Can Not Vote for Himself.*—The election of the county superintendent of schools being vested by law in the township trustees, one of such trustees can not legally vote for himself for that office, and a vote so cast can not be counted in determining the result of the election.

SAME.—*Failure to Object.*—*Implied or Informal Vote.*—A failure of the trustees voting for other candidates to make further objection after the presiding trustee had declared the result of the election, can not be held to be either an implied or informal vote in favor of the officer who voted for himself.

From the Fayette Circuit Court.

R. Conner, G. C. Florea and H. L. Frost, for appellant.

D. W. McKee and L. L. Broaddus, for appellee.

NIBLACK, J.—The proceedings in this case were based upon an information in the name of the State, on the relation of Josiah S. Gamble, and against Frank G. Hornung, which caused the court below to be informed that, on the first Monday in June, in the year 1885, the trustees of the several townships of the county of Fayette met at the office of the county auditor for the purpose of appointing a superintendent of public schools for that county, and thereupon appointed

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the relator such superintendent ; that the relator, who was at the time a citizen of the county, immediately qualified and entered upon the duties of the office ; that, on the 6th day of June, 1887, which was the first Monday of that month, the trustees of the several townships of said county of Fayette again met at the office of the county auditor for the purpose of appointing a superintendent of public schools as the successor of the relator ; that there were, at the time, nine, and only nine, townships in said county of Fayette, the trustees of all which were present ; that the defendant, Hornung, was then the duly elected and acting trustee of Connersville township, one of the townships of said county, and as such trustee was present at the last named meeting, being, also, at the same time an applicant for the office of superintendent of public schools to succeed the relator ; that the trustees proceeded on the same day to determine by ballot who should be appointed to the office in question ; that in casting their ballots four of such trustees voted in favor of the relator, and that the remaining four trustees, other than the defendant, voted for him, the defendant ; that in casting his ballot the defendant voted for himself ; that the ballot so cast for himself by the defendant was counted for him by the trustees, which gave him an apparent majority of one vote ; that the ballot thus cast by the defendant was an illegal vote, and ought not to have been counted for any purpose whatever ; that the county auditor did not give the casting vote in favor of either one of the parties so voted for by the trustees ; that the trustees thereafter adjourned without taking any further action in the matter of the appointment of a superintendent of public schools ; that, by reason of the foregoing facts, the defendant assumed that he had been appointed such superintendent of public schools, known as county superintendent, for said county of Fayette, and took an oath of office and executed an official bond as the law required of persons appointed to that position ; that, on the 13th day of June, 1887, the defendant demanded the possession of the office of such

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superintendent, and deforced him, the relator, from the same; that the defendant had ever since intruded himself into said office, and wrongfully usurped the powers and duties pertaining thereto. Wherefore the defendant was required to answer by what authority he claimed to hold the possession of such office, and all other appropriate relief was invoked.

A demurrer to the information being first overruled, the defendant answered: First. In general denial. Secondly. Giving a history of the cause substantially the same as stated in the information up to the time when the township trustees were about to commence to ballot for a county superintendent of schools, on the first Monday in June, 1887, and then averring that such trustees, before proceeding to ballot, selected Richard W. Sipe, one of their number, to act as chairman of their meeting, who acted accordingly; that the county auditor attended the meeting and acted as the clerk of the election; that the relator and the defendant and one other person were all applicants for the office which the trustees had met to fill; that, without any formal agreement as to the manner of conducting the election, the trustees proceeded to express their individual choice as between the several applicants for the office of county superintendent of schools by voting written ballots; that, throughout thirty-five ballots, the chairman, Sipe, and three others of such trustees voted for the relator, and that the defendant and three other of such trustees voted for him, the defendant; that the remaining trustee voted all the time for the other applicant above referred to; that on the thirty-sixth ballot all of the trustees voted as they had before, except that such remaining trustee voted for the defendant; that during all of the balloting the chairman and other trustees, including the county auditor, had full knowledge that the defendant was voting for himself; that after such thirty-sixth ballot was taken, Sipe, as chairman of the meeting, in the presence and hearing of all the other trustees, announced that the defendant was duly elected and appointed to said office of

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county superintendent of schools; that none of the trustees made any objection to this announcement, and all acquiesced in, and consented to, the same; that said meeting thereupon adjourned without day; that immediately after such adjournment, the county auditor, in a book kept for that purpose, made a proper record of the proceedings had by such trustees, showing that the defendant had been duly elected and appointed as such superintendent; that pursuant to such election and appointment, the defendant, on the 13th day of June, 1887, and after resigning the office of township trustee, took and subscribed the oath required by law and executed an official bond with approved freehold security in the penal sum of one thousand dollars conditioned as the law prescribes; that immediately thereafter the county auditor reported to the superintendent of public instruction that the defendant had been appointed county superintendent of schools for Fayette county; that the defendant has ever since been recognized as such last named superintendent by the superintendent of public instruction; that after executing a bond and qualifying as above stated, the defendant entered upon the discharge of his duties as such county superintendent and has since continued in the discharge of such duties.

A demurrer was sustained to this second paragraph of answer, and a trial resulted in a finding in favor of the relator, assessing his damages at \$425, and in the award of judgment accordingly.

The errors assigned upon the proceedings below, and the argument submitted in favor of the reversal of the judgment, present two questions for our decision :

First. Had Hornung, while acting as a township trustee, the lawful right to vote for himself for the office of county superintendent of schools, and to have his vote counted for himself in determining the result of the ballotings? If not, was there such an acquiescence in, and tacit consent to, the announcement by the chairman of the meeting that he,

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Hornung, had been duly elected as such county superintendent, as amounted in law to an appointment to that office?

A township trustee is the agent of his township in the transaction of its business, and hence, in the performance of his duties, he acts in a fiduciary, as well as an official, capacity. Therefore the rule which requires fair dealings and disinterested conduct on the part of an agent or trustee towards those he represents, applies, with full force, to a township trustee.

The law will not allow an agent or a trustee to place himself in such an attitude toward his principal, or his *cestui que trust*, as to have his interest conflict with his duty, and a township trustee is as much amenable to that rule as any other agent or trustee. As applicable to private rights, the enforcement of such a rule is imperatively necessary, and, as a matter of public policy, the recognition of such a rule is of equal, if not greater, importance. *Greenhood Public Policy*, 302.

A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal and diligence, and primarily for the benefit of the public. It is, also, the duty of a public officer, having an appointing power, to make the best available appointment, and, in such a case, the right of appointment is not, in any sense, the property of the officer possessing the appointing power. It is the policy of the law to secure the utmost freedom from personal interest, or undue influences, in the selection of public officers, whether elective or appointive. Hence it is that the sale, or absolute transfer, of an office is prohibited, and that threats, bribery, and other kindred influences, used to obtain an office, are made criminal; also, that all contracts in restraint of the appointing power, or of the elective franchise, are void. *State, ex rel., v. Hoyt*, 2 Oregon, 246, was based upon the following facts: In June, 1866, Hoyt was elected marshal of the city of Portland by the common council of that city, and entered upon the duties of the office. In July, 1867, the

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common council took proceedings for the purpose of electing a successor to Hoyt. That body consisted of nine members, and, under the charter of the city, five votes were required to elect a marshal. Rosenheim was, at the time, a member of the common council, and was voted for as a candidate for the office of marshal, receiving five, and only five, votes, one of which was cast by him and for himself. Rosenheim, claiming to have been lawfully elected marshal of the city, proceeded by information against Hoyt to obtain possession of the office. Previous to the time of the meeting at which Rosenheim claimed to have been elected, the common council had adopted a rule, which was recognized as still in force, as follows:

“Every member, who shall be present when a question is put, shall vote for or against the same, unless he be immediately interested, in which case, he shall not vote.”

On behalf of Hoyt it was, amongst other things, contended that, under the operation of this rule, as well as upon principles of public policy, Rosenheim's vote for himself was an illegal vote, and that hence he did not receive the requisite number of legal votes to elect him as marshal.

The court held that the rule in question was a binding rule upon the common council, and that, in consequence, Rosenheim's vote for himself was a nullity; also, that it is contrary to the policy of the law to permit a public officer, having an appointing power, to use such power as a means of conferring an office upon himself.

We concur in both of the conclusions reached as above by the Supreme Court of Oregon, and, consequently, feel constrained to hold that Hornung's vote for himself for the office of county superintendent was contrary to public policy, and, for that reason, an utterly illegal vote.

The announcement by the chairman of the meeting at which Hornung was voted for, that the latter had been duly elected as county superintendent, was evidently made upon the mistaken assumption, but in the belief, that Hornung

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had the right to vote for himself if he chose to do so, and the reasonable inference from the antecedent facts is that no objection was made to, and that there was a seeming acquiescence in, that announcement by those who had voted for the relator, only because Hornung had received an apparent majority of the votes cast on the last ballot. The failure of those who had not voted for Hornung to interpose further objection to his selection ought not, under the circumstances, to be construed either into an implied or an informal vote in favor of his appointment. *State, ex rel., v. Kilroy*, 86 Ind. 118; *State, ex rel., v. Sutton*, 99 Ind. 300; *State, ex rel., v. Porter*, 113 Ind. 79; *State, ex rel., v. Edwards*, 114 Ind. 581.

The judgment is affirmed, with costs.

Filed Dec. 15, 1888; petition for a rehearing overruled Jan. 5, 1889.

No. 14,577.

JACKSON v. THE STATE.

CRIMINAL LAW.—Adultery and Fornication.—Cohabitation.—To cohabit with another in a state of adultery or fornication, within the meaning of section 1991, R. S. 1881, is for a man and woman to live together in the manner of husband and wife, for some period of time.

SAME.—Evidence.—To sustain an indictment under the section mentioned, the evidence must establish cohabitation, including one or more acts of sexual intercourse. The intercourse may be inferred from proven circumstances, which raise such a presumption of guilt as to leave no reasonable doubt in that respect in the minds of the jury.

SAME.—Argument of Counsel.—Misconduct.—In his closing address to the jury the prosecuting attorney used the following language: "Washington Jackson's wife is broken-hearted over his conduct in connection with

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this woman. I know what I am talking about. I have been to Greenfield, and heard the evidence before the grand jury, and I know what those people think about this case."

Held, that the language is improper, and the trial court having failed to instruct the jury to disregard it, the judgment of conviction must be reversed.

From the Henry Circuit Court.

J. Brown and *J. W. Morris*, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

MITCHELL, J.—Jackson was indicted and found guilty under section 1991, R. S. 1881, which imposes a fine of not exceeding five hundred dollars, and imprisonment in the county jail not exceeding six months, upon any one who cohabits with another in a state of adultery or fornication.

To cohabit, in the sense of the statute, is for a man and woman to live together in the manner of husband and wife. *State v. Chandler*, 96 Ind. 591.

It implies a dwelling together for some period of time, and is to be understood as something different from occasional, transient interviews, for unlawful and illicit intercourse. To sustain an indictment under this section, the evidence must establish cohabitation, including one or more acts of sexual intercourse, between parties not lawfully occupying the relation of husband and wife to each other. From the very nature of the case, it will rarely happen that direct and positive evidence of acts of illicit intercourse can be obtained. Accordingly, the unlawful and lascivious commerce may be inferred from circumstances proven, which raise such a presumption of guilt, as leaves no reasonable doubt, in that regard, in the minds of the jury.

On the appellant's behalf it is insisted that the evidence fails entirely to support the verdict. It is sufficient to say that while the facts and circumstances show such a relation between the parties as might well have warranted the con-

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clusion that the appellant was guilty of adulterous intercourse with the person named in the indictment, it is not clear from the evidence but that the illicit acts were of an occasional character, unaccompanied by any pretence of the parties living together.

Without further consideration of the evidence, however, the judgment must be reversed for reasons which follow.

During his closing address the prosecuting attorney made the following statement to the jury :

"Washington Jackson's wife is broken-hearted over his conduct in connection with this Lowe woman. I know what I am talking about. I have been to Greenfield, and heard the evidence before the grand jury, and I know what these people think about this case."

The bill of exceptions shows that counsel for the defendant promptly objected, and asked the court to instruct the jury to disregard the statements so made, but the court refused to so instruct the jury, and thereupon stated to counsel, in the hearing of the jury, that the court would not undertake to decide between counsel as to what arguments had been void, but the jury would no doubt determine the cause on the evidence.

An exception was duly taken. No attempt is made, as, indeed, none could well be, to vindicate or justify the extraordinary speech of the prosecuting attorney ; but it is said that the non-interference of the court must have resulted from the fact that it did not understand what was said, and that counsel were in dispute about it, and that the court did all that was proper in saying that the jury would doubtless decide the case on the evidence.

We can not adopt this view of the matter. We must assume that the court understood that the prosecuting attorney used the language above set out in the bill of exceptions. There does not appear to have been any dispute between counsel, or any failure of the court to understand, so far as the speaking of these words is concerned. There is nothing

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to indicate any provocation or justification for such an extra-professional speech. It was the duty of the court to admonish the jury in no uncertain language to disregard the statement.

The evidence not being wholly satisfactory in the respect already mentioned, we can not say but that the verdict resulted from this error. We must therefore reverse the judgment.

Judgment reversed.

Filed Jan. 5, 1888.

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No. 14,296.

JEFFERSON SCHOOL TOWNSHIP v. LITTON, ADMINISTRATOR.

TOWNSHIP.—*School Supplies.—Limitation upon Power of Trustee to Incur Debts.*—A township trustee can not, without first procuring an order from the board of county commissioners, as provided in sections 6006 and 6007, R. S. 1881, incur a debt in behalf of his school township for school furniture and apparatus, in excess of "the fund on hand" to which such debt is chargeable, and of "the fund to be derived from the tax assessed against his township for the year in which such debt is to be incurred."

SAME.—*Statute Construed.*—The provision, "the fund on hand," as used in section 6006, means the money actually in the hands of the trustee, and the provision, "the fund to be derived from the tax assessed against his township for the year in which such debt is to be incurred," means the amount to be derived from the school tax assessed in the prior calendar year and collectible during the year in which the debt is to be incurred.

SAME.—*Legalizing Act of 1883.*—Under the act of 1883 (Acts of 1883, p. 114), an indebtedness incurred in 1882 by a township trustee for suitable and necessary school supplies, in violation of sections 6006 and 6007, is legalized and made an enforceable obligation against the township.

From the Sullivan Circuit Court.

Jefferson School Township v. Litton, Administrator.

W. C. Hultz and O. B. Harris, for appellant.

J. T. Hays and H. J. Hays, for appellee.

ZOLLARS, J.—As administrator of the estate of A. Litton, deceased, appellee instituted this action against the school township to recover the amount of two certificates of indebtedness issued by the trustee of that township to the McBride Tellurian Company for thirteen of the McBride tellurians. The decedent held the certificate as a *bona fide* assignee of the McBride Tellurian Company.

It is averred in the complaint that the tellurians were suitable and necessary for the schools of the township; that they were delivered to, and accepted by, that corporation, and have ever since been used in the schools, and that they were of the value agreed upon and stated in the certificates of indebtedness.

Under the decisions of this court the complaint is clearly sufficient to withstand the demurrer. *Bloomington School Tp., etc., v. National School Furnishing Co.*, 107 Ind. 43; *State, ex rel., v. Hawes*, 112 Ind. 323; *Boyd v. Mill Creek School Tp.*, 114 Ind. 210; *Miller v. White River School Tp.*, 101 Ind. 503; *Pine Civil Tp. v. Huber Manf'g Co.*, 83 Ind. 121.

It was held in the case last above cited, that a defence, based upon the act of 1875, sections 6006 and 6007, R. S. 1881, need not be anticipated in the complaint, but must be brought forward by an answer. That, the appellant, defendant below, attempted to do, and the question is, as to whether or not the answer is sufficient under those sections and subsequent legislation.

Section 6006 provides that "Whenever it becomes necessary for the trustee of any township in this State to incur, on behalf of his township, any debt or debts whose aggregate amount shall be in excess of the fund on hand to which such debt or debts are chargeable, and of the fund to be derived from the tax assessed against his township for the year in

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which such debt is to be incurred, such trustee shall first procure an order from the board of county commissioners of the county in which such township is situated, authorizing him to contract such indebtedness."

Section 6007 provides that "Before the board of commissioners shall grant such order, the township trustee shall file, in the auditor's office of his county, a petition, setting forth therein the object for which such debt or debts are to be incurred and the approximate amount required, and shall make affidavit that he has caused notice to be given of the pendency of such petition, by posting notices, in not less than five public places in his township, at least twenty days prior to the first day of the session of said board."

That those sections limit the authority of township trustees to incur debts on behalf of their school townships, as well as on behalf of their civil townships, we have no doubt. This conclusion was reached in the case of *Middleton v. Greeson*, 106 Ind. 18, after a very thorough examination of former rulings, and of those sections, as well as of later statutes which lend aid to the conclusion by way of legislative interpretation. To what was said in that case in support of the conclusion reached, but little need be added here.

The precise question adjudicated in that case was, that a township trustee can not, without complying with the provisions of sections 6006 and 6007, incur a debt on behalf of his school township for the erection of a school-house, in excess of the fund on hand to which such debt is chargeable, and of the fund to be derived from the tax assessed against his township for the year in which such debt is incurred.

The reasoning in the case, however, just as inevitably leads to the conclusion that such trustee is thus limited by those sections in contracting debts in behalf of his school township for school furniture and apparatus.

Such contracts were by far the most common, and had led to abuses which the Legislature, doubtless, intended to check by the enactment of sections 6006 and 6007, *supra*, and by

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the passage of subsequent acts. The act of 1873 (Acts 1873, p. 209; section 4471, R. S. 1881), for example, referred to in the decision of that case, has as much reference to debts contracted for school furniture and apparatus as for erecting or repairing school-houses.

The title of the act is: "An act to authorize township trustees to levy an additional tax * * * for the purpose of paying, satisfying, and liquidating debts made and contracted by such trustee, in the construction, repairing, or completing of school-houses, and providing furniture and school apparatus therefor," etc.

And so, the act provided that in all cases where any township trustee may have heretofore contracted debts against any township in the construction, repairing or completion of school-houses, or in providing furniture, or school apparatus therefor, and the special school revenue tax as provided for, etc., shall be insufficient to satisfy, pay and liquidate debts so made and contracted by such trustee, then, and in that case, such township trustee might make an additional levy, etc.

That act not only shows that the term "township trustee" was used by the Legislature as designating the officer, whether acting as trustee of the civil township or as trustee of the school township, but, also, that school townships had become indebted for school-houses, and for school furniture and apparatus, beyond their ability to pay without a tax levy beyond what the law at that time authorized. The purpose of the act was to enable township trustees to pay off the indebtedness of both the civil and school townships, and start anew.

When 1875 came, it was found, in all probability, that while the act of 1873, *supra*, may have enabled township trustees to pay off the prior indebtedness of the civil and school townships, it had in no way tended to lessen prodigal expenditures on their part.

As stated in the case of *Middleton v. Greeson*, *supra*, the act of 1875 (sections 6006 and 6007, *supra*,) doubtless was intended to check and remedy a growing evil. That evil, as

evidenced by the act of 1873, *supra*, was the contracting of debts in the building and repairing of school buildings, and in the purchase of school furniture and apparatus, in excess of the funds at the command of the trustees.

It would not be reasonable to suppose that the Legislature, with the evils before it, as evidenced by the act of 1873, intended by the act of 1875 to overlook the greatest of those evils, viz., the prodigal incurring of debts for school furniture and apparatus.

Having determined that sections 6006 and 6007 limit the power of township trustees to incur debts on behalf of school townships in the purchase of school supplies, we come to the question of the proper construction of section 6006, about which counsel disagree.

Without an order from the county board, a township trustee can not incur on behalf of his township any debt or debts whose aggregate amount shall be in excess of *the fund on hand to which such debt or debts are chargeable, and of the fund to be derived from the tax assessed against his township for the year in which such debt is to be incurred.*

What is the proper construction of that portion of the section which we have italicized?

Counsel for the appellee contend that the "fund on hand" means the money actually in the hands of the trustee, and the amount to be derived from the special school revenue tax assessed in the prior year and collectible during the year in which the debt is to be incurred, and that "the fund to be derived from the tax assessed against his township for the year in which such debt is to be incurred," is the fund to be derived from the tax assessed in the year in which the debt may be incurred, although collectible in the year following. We can not give our sanction to that construction.

In the absence of anything in the act indicating a different intention, the "year" must be taken to be the calendar year, from the 1st day of January to the 31st day of December. Section 240, R. S. 1881. The language of the sec-

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tion, it will be observed, is not "and of the fund to be derived from the tax assessed against the township *in* the year," but "of the fund to be derived from the tax assessed against the township *for* the year" in which the debt is to be incurred.

The township trustee has authority, and it is made his duty, at the June session of the county board annually, with the advice and concurrence of that board, to levy a special tax on the property of the township, and a poll-tax for the construction of school houses, etc., and for providing furniture and school apparatus, etc. The levy thus made, he is required to report to the county auditor, whose duty it is to enter the same upon the proper tax duplicate, to be collected by the treasurer as other taxes are collected. Sections 4467, 5995, R. S. 1881.

It is the duty of the county auditor, between the first Monday in June and the last day of December, to make out a duplicate list of taxes assessed in the county, etc., and to deliver a copy of the duplicate to the county treasurer on or before the last day of December. Sections 6417, 6422.

The taxpayer has until the third Monday in April in which to pay the first instalment of his taxes, and until the first Monday in November to pay the second instalment. Section 6426, R. S. 1881.

The county treasurer is required to make annual settlements with the auditor on the third Monday in April, and after such settlement, upon the warrant of the auditor, to pay over to township trustees all moneys in his hands belonging to each township. Sections 6000, 6500, R. S. 1881.

It will thus be seen that taxes are not to be, and can not be, collected in the same calendar year in which they are assessed. They are assessed *in* one year *for* the succeeding year—the year in which they are to be collected. When, therefore, a township trustee makes an estimate of the amount of special school revenue necessary, and makes the levy by virtue of the above cited statutes, he has, and must have, reference to the wants of the succeeding year. In

other words, the tax is assessed *in* one year for the year following.

In the case before us the debt was incurred on the 10th day of October, 1882. The fund on hand to which the debt was chargeable at that time was the amount of the special school revenue in the hands of the trustee. Clearly, an uncollected tax is not a fund on hand, nor is a fund in the hands of the county treasurer a fund on hand as to the township trustee. And at the time the debt was incurred, the fund to be derived from the tax assessed against the township *for* the year was the fund to be derived from the special school revenue tax assessed in 1881, to be collected in 1882. But two funds are at the disposal of the township trustee under sections 6006 and 6007, *supra*. One is the fund actually on hand, and the other is the special school revenue tax assessed *for* that year. The section does not authorize the trustee, in estimating the funds, to include two tax levies. Under the construction which we here adopt, the township trustee may, at any time, readily determine whether or not a debt which he is about to incur on behalf of his township may be incurred by him without authority from the county board. He can readily know how much he has on hand, and he can also readily know, very nearly, at least, by an examination of the tax duplicates and by consulting with the county treasurer, how much he will receive during the year from the tax assessed for, and collectible in, the year.

Persons dealing with him, also, will thus have some opportunity of ascertaining whether or not the debt which he may propose to incur on behalf of his township may be incurred by him without authority from the county board.

Under the construction contended for by appellant's counsel, neither the trustee, nor those dealing with him, could in any case ascertain those facts until after the tax levy in June in each year. Persons owning property on the 1st day of April in any year are liable for the taxes assessed and levied in that year, but that is by virtue of special statutes, which

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are not important here. Sections 6281, 6446, R. S. 1881; *Kirkpatrick v. Pearce*, 107 Ind. 520.

The answer shows that the debt involved here, and which was incurred on behalf of the school township by the township trustee, was in excess of the amount of the fund on hand, and the fund to be derived from the tax assessed against the township, for the year in which the debt was incurred. The answer, therefore, brings the case within the terms of sections 6006 and 6007, *supra*.

We have concluded, however, that the act of 1883 (Acts 1883, p. 114) makes the debt valid, and, therefore, renders the answer insufficient. In that act there is a recognition of the fact that, notwithstanding the act of 1875, sections 6006 6007, *supra*, township trustees had gone on, and had undertaken, at least, to incur debts in violation of their provisions.

The preamble of the act is: "Whereas, many townships in the various counties in the State of Indiana have become indebted to an amount in excess of their present ability to pay, and at the same time keep up current expenses, with the amount of taxes now by law authorized to be levied, therefore," etc.

Section 1 of the act is as follows: "Be it enacted * * * That in any such township the trustee thereof shall have the power to levy, in their respective townships, taxes sufficient to pay such indebtedness; but the taxes herein authorized to be levied shall not in any one year exceed the sum of twenty cents on each one hundred dollars valuation of taxable property, in such township, and twenty-five cents on each taxable poll, for the debt of the school township, and a like amount for the civil township (as the case may require), in addition to the amounts now authorized by law to be levied; and the revenues arising from the taxes herein authorized to be levied shall in no case be diverted to or used for any other purpose than the liquidation of such indebtedness."

In that act the Legislature again, as by the act of 1873, *supra*, authorized an additional levy to pay debts incurred

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by township trustees on behalf of their school and civil townships, in excess of the ability of the townships to pay without an additional levy. By thus providing for the payment of such debts, without distinction as to the manner in which they had been incurred, the Legislature, we think, not only gave recognition to the equity and justness of the creditor's claims, but impliedly, at least, legalized those claims in so far as the debts may have been incurred in violation of sections 6006 and 6007, *supra*. We are strengthened in this conclusion especially by the second section of the act. It reads as follows: "And it is further provided, that any township trustee * * * who shall contract any debt in the name or in behalf of any civil or school township of which he may be the trustee, contrary to the provisions of sections 1 and 2 of 'An act to limit the powers of township trustees in incurring debts,' * * * approved March 11th, 1875 (the same being numbered six thousand and six and six thousand and seven of the Revised Statutes of the State of Indiana), shall be personally liable, and liable on his official bond, to the holder of any contract or other evidence of such indebtedness, for the amount thereof."

That section seems very clearly to have been based upon the assumption that township trustees had undertaken, at least, to incur debts in violation of sections 6006 and 6007, *supra*, and that, notwithstanding such violations, creditors without actual knowledge of the facts should be protected as in the first section provided. As to the future, two purposes are manifest in the section: One is to save innocent creditors, and the other is to effectually prevent any further extravagance on the part of township trustees in violation of sections 6006 and 6007, *supra*, by making them and their bondsmen liable for the debts thus contracted. See again *State, ex rel., v. Hawes, supra*.

There having been no error in sustaining the demurrer to the answer, the judgment is affirmed, with costs.

Filed Jan. 5, 1889.

McCallister *et al.* v. Sigler.

No. 13,461.

McCALLISTER ET AL. v. SIGLER.

SUPREME COURT.—*Weight of Evidence.—Practice.*—The finding of the trial court will not be disturbed where there is evidence sustaining it.

From the Huntington Circuit Court.

J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellants.

L. P. Milligan and O. W. Whitelock, for appellee.

ELLIOTT, J.—The appellee claimed the property in controversy as exempt from execution. This claim is resisted by the appellants on the ground that the property was partnership property, and can not be claimed under the exemption law. We can not sustain the appellants' contention, for there is evidence showing that the property belonged to the appellee, and not to the firm of which he was a member.

The case falls within the rule that the finding of the trial court will not be disturbed where there is evidence sustaining it.

Judgment affirmed.

Filed Nov. 13, 1888.

Stringer v. Frost.

No. 13,505.

STRINGER v. FROST.

116	477
139	366
116	477
157	223
116	477
166	495

NEGLIGENCE.—*Reckless Riding upon Street.—Liability of Infant.*—An infant who negligently, and without any contributory fault on the part of a pedestrian, rides down and injures the latter while crossing a public street, is liable in damages.

SAME.—*Care Required of Foot Passengers in Crossing Street.*—A person about to cross a public street on foot must take proper precautions to avoid collision with horsemen or vehicles, but the degree of care required at a railroad crossing is not necessary.

SAME.—*Anticipation of Injury.—Contributory Negligence.*—Foot passengers have equal rights in streets with other persons, and one is not guilty of negligence who fails to anticipate, and take special precautions against, injury by persons riding or driving at an unusual and dangerous rate of speed.

SAME.—*Evidence.—Amount of Travel Upon Street.*—In an action by a foot passenger to recover for injuries sustained in being run down in a public street, evidence of the large amount of travel upon the street is admissible as tending to show the impropriety of the defendant's conduct in riding thereon at immoderate speed.

PRACTICE.—*Objections to Evidence.—Must be Specific.*—A general objection to the admission of evidence on the ground that it is "incompetent, immaterial and irrelevant," presents no question for decision.

From the Allen Superior Court.

M. L. Graff, for appellant.

J. B. Harper and *W. G. Colerick*, for appellee.

MITCHELL, J.—Action by Harriet Frost against Elza T. Stringer and his minor son, Frederick O. Stringer, to recover damages alleged to have been wrongfully inflicted by the defendant Frederick O. Stringer upon the plaintiff, in negligently riding his father's horse upon her while she was crossing a public street in the city of Fort Wayne.

The jury returned a general verdict in favor of the father, and against Frederick O. Stringer, and they also returned answers to special interrogatories submitted to them by the parties respectively.

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On the appellant's behalf, it is contended that the answers to special interrogatories make it apparent that the plaintiff was guilty of contributory negligence, and that it was, therefore, error for the court to overrule his motion for judgment notwithstanding the general verdict.

It is doubtless the rule in cases of this nature, that a recovery will not be sustained whenever there is negligence on the part of the plaintiff contributing directly to, or which was a proximate cause of, the occurrence from which the injury arises, and that the burthen is upon the plaintiff to show that the injury is not attributable to any want of proper care on his part. *Murphy v. Deane*, 101 Mass. 455. We do not, however, concur in the view that this rule was violated by overruling the appellant's motion for judgment.

The general verdict affirmed the defendant's negligence, and that the plaintiff was herself in the exercise of due care, and it is too well settled to justify the citation of authority, that unless the facts specially found are in irreconcilable conflict with the general verdict, the general verdict must control.

It would serve no useful purpose to set out the interrogatories and the answers of the jury. It is quite sufficient to say they show beyond question that the defendant was culpably negligent, in that at the time of the collision he was riding his horse at an improper rate of speed along a much used public street in a populous city, and at the same time looking in another direction from that in which he was rapidly proceeding; and that they do not show the neglect of the plaintiff to take any reasonable precaution which would have prevented the collision that occasioned the injury.

We agree that it is the duty of a person crossing, or about to cross, a public street on foot, to look and take precautions according to the character of the thoroughfare, so as to avoid collision with approaching horsemen or vehicles; but it is obviously not necessary that the same high degree of vigilance should be demanded of a footman about to cross a public street, in order to avoid contact with a horseman, who

is likewise under a duty to be on the lookout, and to have his horse under careful control, as is required at railroad crossings, over which engines and trains of cars are necessarily run at a rate of speed not readily governable. *Wendell v. New York Central, etc., R. R. Co.*, 91 N. Y. 420; *Barker v. Savage*, 45 N. Y. 191; *Williams v. Grealy*, 112 Mass. 79.

Unless the occasion is of an extraordinary character, persons have no right to ride or drive through the streets of a populous city at a rate of speed which makes it dangerous to foot travellers using ordinary care, while trains of cars can not be moved so that their speed may be arrested in a moment, when footmen are seen in the way.

The court committed no error in overruling the appellant's motion for judgment notwithstanding the general verdict.

It is not necessary to discuss the sufficiency of the evidence. The plaintiff's testimony, which the jury must have accepted as true, sustains the verdict to the fullest extent.

Accepting the plaintiff's testimony, and it can not be said that she was guilty of contributory negligence, or that the want of ordinary care on her part proximately or directly contributed to the injury. Foot passengers have equal rights in the streets with those mounted on horseback or driving in carriages. Neither have a priority of right over the other. Both are bound to use reasonable care to avoid collision. *Belton v. Baxter*, 54 N. Y. 245; *Cotton v. Wood*, 8 C. B. (N. S.) 568.

The plaintiff had the right to cross the street at the crosswalk or elsewhere, exercising such caution and prudence as the circumstances demanded to avoid being injured, while the defendant had the right to ride along the street, observing such watchfulness for footmen, and having his animal under such control, as would enable him to avoid injury to others who had corresponding and reciprocal rights in the street. *Simons v. Gaynor*, 89 Ind. 165; *Murphy v. Orr*, 96 N. Y. 14; *Moebus v. Herrmann*, 108 N. Y. 349 (2 Am. State Rep.

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440); *Brooks v. Schwerin*, 54 N. Y. 343; *Daniels v. Clegg*, 28 Mich. 32; *Shapleigh v. Wyman*, 134 Mass. 118.

Children and infirm persons, as well as those who are of mature years, and in the vigor and activity of health, have the right to walk along or across the streets of a city, observing such care as persons of like age and condition are accustomed to use, and all have a right to assume that carriages will not be driven, or horses ridden, over the streets at an improper rate of speed. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504.

It can not, therefore, be said as a matter of law, that one is guilty of negligence who does not anticipate, and take special precautions against, injury from the reckless and improper conduct of others in riding or driving at an unusual and dangerous rate of speed. *Coombs v. Purrington*, 42 Maine, 332; *Boss v. Litton*, 5 C. & P. 407; *Williams v. Richards*, 3 C. & K. 81.

Some questions were asked of witnesses, produced by the plaintiff below, which were objected to as "incompetent, immaterial and irrelevant." It has often been decided that an objection of this general character, without more, presents no question for decision. *Bundy v. Cunningham*, 107 Ind. 360; *Chapman v. Moore*, 107 Ind. 223; *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196.

A witness was also permitted to testify, over objection, that there was more travel upon the street over which the defendant was riding at the time he ran upon the plaintiff, than upon any other street in the city of Fort Wayne. As tending to show the impropriety of the defendant's conduct in riding at an immoderate rate of speed, this evidence was competent.

The alleged modification of the instructions asked by the appellant presents no question which requires a reversal of the judgment.

The judgment is affirmed, with costs.

Filed Jan. 8, 1889.

 Flint v. Burnell et al.

No. 13,438.

FLINT v. BURNELL ET AL.

116	481
129	381

116	481
129	470
116	481
130	351

BILL OF EXCEPTIONS.—*Long-Hand Report of Evidence.*—*Use of Words* “Here Insert.”—*Practice.*—Oral testimony taken by the court stenographer can not be brought into a bill of exceptions by using the words “here insert” in a skeleton bill.

From the Lagrange Circuit Court.

S. J. Peelle and *W. L. Taylor*, for appellant.

O. L. Ballou, for appellees.

ELLIOTT, J.—The questions in this case can not be decided without the evidence, and that is not properly in the record. The counsel who prepared the bill of exceptions wrote a skeleton bill, and attempted to make provision for the insertion of the oral testimony taken by the stenographer by using the words “here insert,” without setting out the evidence. This course is not the proper one. At common law all evidence must be incorporated in the bill before it is signed. *Irwin v. Smith*, 72 Ind. 482, and cases cited pp. 488–489.

Our statute modifies the common law rule, but it does not so far change it as to enable a party to get the evidence into the record in the method adopted in this case. *Wagoner v. Wilson*, 108 Ind. 210; *Stone v. Brown*, ante, p. 78.

Judgment affirmed.

Filed Dec. 14, 1888.

VOL. 116.—31

Douthit *et al.* v. Mohr.

No. 13,300.

DOUTHIT ET AL. v. MOHR.

PLEADING.—Written Instrument.—Loss of.—Excuse for not Filing Original or Copy.—An averment that a written instrument sued upon is lost, is a sufficient excuse for failing to file such instrument or a copy with the complaint, without an additional averment that diligent search had been made.

SAME.—Contract.—Execution of.—Equivalent Terms.—Delivery and Acceptance.—An averment that a person entered into a contract in writing is the equivalent of an averment that he executed the contract, and the execution of a written instrument implied a delivery and acceptance.

SAME.—Promissory Note.—Averment of Non-Payment.—A complaint upon a promissory note must show that the note is unpaid, but this may either be by a direct averment or by a statement of facts from which it may be fairly inferred.

From the Shelby Circuit Court.

J. B. McFadden, for appellants.

W. H. Isley and A. Akers, for appellee.

NIBLACK, C. J.—This action was commenced before a justice of the peace, Christian Mohr, the appellee here, being the plaintiff, and Alonzo Douthit and George Baker, the appellants, being the defendants. The plaintiff obtained a judgment before the justice. Upon an appeal to the circuit court the plaintiff filed a new and substituted complaint, charging that, on the 5th day of May, 1885, Douthit executed to the plaintiff his promissory note for the sum of \$65.18, payable one day after date; that Douthit failed to pay the note at maturity; that afterwards Douthit and the plaintiff had a final settlement, and that as a part of such final settlement the defendants, Douthit and Baker, entered into a written agreement concerning the payment of such note; that by the terms of the agreement Douthit was to pay the note in sawing lumber for the plaintiff at and for the customary price for such work; that Douthit was to commence such

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116	482
164	648

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sawing on the 1st day of September, 1885, and to saw five dollars' worth each week until the note was paid; that Baker entered into the contract or agreement in writing as surety for Douthit, whereby he obligated himself for the execution of the same and the payment of the note; that, notwithstanding sufficient time had elapsed to enable them to pay the note in sawing, the defendants had failed and refused to saw any lumber, or to pay the note in money; that after the cause had been appealed to the circuit court the contract or agreement sued on, and the note and other papers pertaining to the action, had become lost, wherefore the plaintiff asked leave to make proof of such contract or agreement and the note.

A several demurrer to the complaint being first overruled, the circuit court heard the evidence and gave judgment in favor of the plaintiff.

Error is assigned only upon the overruling of the demurrer to the complaint.

The objections made to the complaint are: First. That a sufficient excuse is not shown for failing to file the note and contract, or copies of them, with the substituted complaint. Second. That there is no averment that the contract was either delivered to Mohr or accepted by him. Third. That there is no allegation that the note remained unpaid when the action was commenced.

In support of the first objection, it is claimed that it was not sufficient to aver simply that the note and contract were lost; that an additional averment that diligent search had been made for these instruments in writing, and that they could not be found, was necessary, citing the case of *Van Dorn v. Bodley*, 38 Ind. 402.

While, as applicable to the claim thus made, there may be some obscurity in the phraseology of the case cited, the point really there decided was, that the averment of the loss of a written instrument sued upon, was a sufficient excuse for not filing either the instrument or a copy with the complaint, which was in accordance with the previous as well as the subse-

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quent holdings of this court. *Cleveland v. Roberts*, 14 Ind. 511; *Blasingame v. Blasingame*, 24 Ind. 86; *Anderson School Tp. v. Thompson*, 92 Ind. 556.

As preliminary to parol proof of the contents of a lost instrument in writing, evidence is usually required that diligent but unavailing search had been made for the instrument, but this involves a rule of evidence and not of pleading.

In answer to the second objection to the complaint, it may be said that the allegation that a person entered into a recognizance implies that he executed a recognizance, that is, that he did all that was necessary to make the recognizance binding upon him. As analogous to this, the averment that a person entered into a contract in writing to do some specified thing, is the equivalent of an allegation that he executed the contract into which he so entered. That the execution of a written instrument implies a delivery and an acceptance is a rule of construction too familiar to require the citation of authorities.

It has been frequently held that a complaint upon a promissory note must show that the note remained unpaid at the time the action was instituted. *Wheeler & W. Manf'g Co. v. Worrall*, 80 Ind. 297. But this need not be in direct terms. It is sufficient if facts be stated from which it may be fairly inferred that the note remains unpaid. *Downey v. Whittenberger*, 60 Ind. 188. The fair inference from the facts stated in the complaint in this case is, that the note remained unpaid when that pleading was filed.

The third objection to the complaint is, for this reason, also, not well founded.

The judgment is affirmed, with costs.

Filed Nov. 9, 1888; petition for a rehearing overruled Jan. 9, 1889.

Greenwood v. The State.

No. 14,666.

GREENWOOD v. THE STATE.

SPECIAL JUDGE.—*Oral Appointment.*—Where the appointment of an attorney as special judge is not in writing, an objection to his competency to act must be sustained if promptly made; if objection be not seasonably made, it will be deemed waived, and the acts of the *de facto* judge upheld.

From the Elkhart Circuit Court.

L. J. Blair, H. D. Wilson and W. J. Davis, for appellant.

L. T. Michener, Attorney General, and *L. W. Vail*, for the State.

ELLIOTT, C. J.—This judgment must be reversed. Objection was duly made to the judge of the court, and he called a member of the bar to preside as judge, but made no written appointment, as the law requires. The appellant at once objected to the competency of the attorney called by the judge, and thus presented the question at the earliest opportunity. As there was no written appointment, and as the objection was promptly interposed, the appeal must be sustained. *Schlunger v. State*, 113 Ind. 295; *Herbster v. State*, 80 Ind. 484; *Evanis v. State*, 56 Ind. 459; *Kennedy v. State*, 53 Ind. 542.

In sustaining this appeal we do not mean to hold that an oral appointment is absolutely void; on the contrary, we do hold, as we did in *Schlunger v. State*, *supra*, that it is not absolutely void, and that an objection to the method of appointment may be waived, and will be deemed waived unless seasonably made.

The person appointed is at least judge *de facto*, and in order to make availing an objection to the competency of a judge *de facto*, it must be promptly interposed, for the acts of such a judge may be valid, and so they will be regarded where

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119	537
121	166
116	486
130	21
116	486
149	643

116	485
154	156

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there has been a waiver of objections. *Smurr v. State*, 105 Ind. 125, and authorities cited.

The term "void" is improperly used in some of the cases, for the acts of a *de facto* judge are at most only voidable. We can not approve of some of the expressions found in the cases upon this question, for we are convinced that, upon principle and authority, the acts of a *de facto* judge will stand unless promptly and properly assailed.

Judgment reversed.

Filed Jan. 8, 1889.

No. 14,460.

MAHER ET AL. v. THE AETNA LIFE INSURANCE COMPANY.

SHERIFF'S SALE.—*Unperfected Bid.*—*Memorandum.*—*Re-Sale.*—Under a decree of foreclosure the mortgaged land was offered by the sheriff for sale. The judgment plaintiff bid less than one-fourth the amount of his judgment, and the land was openly struck off to him. It is not shown that the sheriff made any memorandum of the sale or issued a certificate. Subsequently the sheriff re-advertised the land and sold it to the same bidder for the full amount of his judgment.

Held, that as it does not appear that the first sale was perfected, or that the sheriff exceeded his discretionary powers, that sale was not enforceable, and a re-sale was authorized.

From the Daviess Circuit Court.

J. Baker and A. J. Padgett, for appellants.

W. R. Gardiner and S. H. Taylor, for appellee.

MITCHELL, J.—The following appears to be the case as made by the record: On the 25th of January, 1882, Thomas Maher

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and his wife, Ellen, executed a mortgage on certain real estate owned by the husband, to secure the payment of a debt of \$2,500 due from the latter, with annual interest at 7 per cent., payable to the Aetna Life Insurance Company, in five years. The debt matured, and, remaining unpaid, the insurance company foreclosed its mortgage, and took a personal judgment against Thomas Maher for \$2,882.52. A certified copy of the decree was placed in the hands of the sheriff of Daviess county, who, after due advertisement, offered the land therein described for sale in parcels. The plaintiff made bids upon the several parcels, aggregating \$600, whereupon the sheriff openly struck off and sold the land to the plaintiff.

It does not appear that the sheriff ever made any memorandum or other entry of the sale on the writ, or that he issued any certificate of purchase, but so far as appears it may be inferred that the sale was abandoned by mutual consent of the sheriff and the bidder immediately after the property was struck off. Subsequently the sheriff re-advertised the land and sold it to the insurance company, for the full amount of the judgment, interest and costs, the latter paying the amount of its bid and receiving a certificate of sale.

This was a proceeding by Maher and wife, by way of motion in the court below, based upon a showing of the above mentioned facts, asking to have the last mentioned sale set aside and vacated, and that the appellee should be held to the first sale. This motion was denied, and it is now insisted on behalf of appellants, that the first sale exhausted the right of the insurance company in the land sold, and that the subsequent sale was hence without authority of law and void.

It is undoubtedly true that a perfected or consummated decretal or execution sale of property exhausts the lien of the decree or judgment in respect to the property sold, and that the judgment creditor can not re-sell the same property until it is redeemed by the owner or some person claiming under

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him, so as to vacate the first sale and reinstate the lien. *Hervey v. Krost, ante*, p. 268.

The infirmity in the appellants' position is, that it does not appear that the first sale was completed, so as to become binding, or to give those interested the right to insist upon its consummation. That the land was offered, and a bid made and accepted, without more, neither accomplished a sale nor conferred the right upon the execution defendants to enforce compliance with the bid.

Sheriff's sales of real estate are subject to the provisions of the statute of frauds, and are hence not enforceable, even if otherwise unobjectionable, unless a sufficient memorandum has been made by the sheriff at the time. *Elston v. Castor*, 101 Ind. 426 (433).

The law invests the sheriff with some discretion in making sales, and if for any reason the consummation of a sale, even after the property has been struck off, would operate with unusual and inordinate severity upon the debtor, by needlessly sacrificing his property, the sale ought not to be completed, especially if the purchaser consents to the withdrawal of his bid, as may be inferred was the fact in the present case. *Freeman Ex.*, section 288. Besides, a purchaser, whether he be the execution creditor or a stranger, may withdraw or refuse to pay his bid, in which case the sheriff or either of the parties to the writ may, if a sufficient memorandum has been made, enforce payment, with damages, as provided in section 760, R. S. 1881, or the sheriff may re-expose the property to sale and hold the first purchaser liable for the deficiency, in case the amount bid at the second sale shall be less than the sum bid at the first, and the costs of the second sale. Section 761, R. S. 1881.

It may be that the purchaser withdrew or refused to pay his bid, and that the sheriff, in the exercise of the discretion vested in him, deemed it the better course for all parties concerned to permit the bid to be withdrawn, or to decline

Maher et al. v. The Etna Life Insurance Company.

to make the necessary memorandum, so as to enable him to enforce payment and re-expose the property to sale.

Since it appears that the property brought more than four times as much at the second sale as at the first, it is not readily apparent how the appellants have been injured.

It is contended on the appellants' behalf that Ellen Maher, as wife, is entitled to redeem, and that it would be to her advantage to have the first sale perfected so that she may redeem from a six hundred dollar bid, rather than from the larger one made on the second sale. Whether or not it would have been more advantageous to the debtor's wife, in case the first sale had been perfected, and whether, if it would, that would constitute a reason for enforcing a sale of her husband's property at a nominal price, rather than for a price more nearly proportionate to its value, presents questions which we need not consider, since, as we have already seen, within the discretion lodged with the sheriff the sale was not so far completed as to be enforceable. There was no error.

The judgment is affirmed, with costs.

Filed Jan. 9, 1889.

Jones v. Ahrens *et al.*

116 490
117 600

No. 13,470.

JONES v. AHRENS ET AL.

JUDGMENT.—*Action for Review.*—Where Brought.—An action to review a judgment must be brought in the court which rendered the judgment.

PLEADING.—*Defects Curable by Verdict.*—*Motion in Arrest.*—Where the defects in a complaint are of a character curable by verdict, the complaint is good as against a motion in arrest of judgment.

PRACTICE.—*Defect of Parties.*—*Motion in Arrest.*—A motion in arrest of judgment presents no question as to a defect of parties.

From the Warren Circuit Court.

C. V. McAdams, for appellant.

J. McCabe and E. F. McCabe, for appellees.

BERKSHIRE, J.—The appellant commenced an action against the appellees and one Augustus Zure, in the October term, 1885, whereby he sought to recover a money judgment against John W. Ahrens and Zure, and to obtain a decree declaring a certain conveyance executed by John W. Ahrens to Augustus Ahrens fraudulent as to creditors, and subjecting the real estate to sale to pay and satisfy the indebtedness.

The appellees demurred to the complaint, which demurrer the court overruled, and the proper exception was entered.

The cause was then put at issue and tried, and a judgment and decree rendered as prayed for in the complaint.

On the 4th day of January, 1886, the appellees, without making Zure a party, brought an action against the appellant to review the judgment and decree that had been rendered in the original action.

To the complaint for review the appellant demurred, assigning as cause of demurrer that the complaint did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, after which the appellant moved in arrest of judgment.

The motion in arrest was overruled, and an exception en-

Jones v. Ahrens *et al.*

tered, following which the court gave judgment reversing the judgment and decree rendered in the original action, and ordering the original cause redocketed by its original number.

The original cause was placed upon the docket, and at the next term the court reversed the ruling formerly made, overruling the demurrer to the complaint in that action, and sustained the demurrer thereto, and gave judgment against the appellant for costs.

The appellant assigns two errors :

1. The court erred in overruling the motion in arrest of judgment.
2. The court erred in giving judgment that the original action be redocketed.

The second assignment must be disregarded, for the reason that it can not be assigned as error that the court erred in ordering a cause redocketed.

The first error is well assigned, and presents for consideration two questions :

1. Had the court jurisdiction over the subject-matter of the action ?
2. Does the complaint state a good cause of action ? R. S. 1881, section 343.

There can be no question about the jurisdiction of the court.

The original action was brought in the Warren Circuit Court, and prosecuted to judgment therein. It was not only proper, but imperative, that the action to review be brought in that court. R. S. 1881, section 615.

The complaint for review states a cause of action in general terms, and is probably sufficient to withstand a demurrer. If defective, the weakness is of a character curable by verdict, and the pleading is, therefore, good as against a motion in arrest of judgment. *Buskirk Pr.*, 264 ; *Adamson v. Rose*, 30 Ind. 380 ; *Spahr v. Nicklaus*, 51 Ind. 221 ; *Waugh v. Waugh*, 47 Ind. 580 ; *Jones v. Jones*, 97 Ind. 188.

The point is made that Augustus Zure, one of the defend-

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ants to the original action, is not a party to the action to review. To the latter action he was a necessary party, and had the appellant demurred to the complaint, assigning as a cause of demurrer that there was a defect of parties, it would have been error to have overruled the demurrer, but a motion in arrest of judgment did not present the question.

The judgment of the court below is affirmed.

Filed Jan. 9, 1889.

No. 13,332.

GLAZE v. THE CITIZENS NATIONAL BANK OF CRAWFORDSVILLE.

116	499
150	238
116	492
153	15

FORMER ADJUDICATION.—*Title to Money.*—*Bank.*—*Demand.*—Where a plaintiff brings an action asserting title to money deposited in bank and drawn by the defendant, and the latter, by an affirmative answer, asserts title in himself, and on that answer has judgment, there is an adjudication of the question of title which may be pleaded by the bank in bar of an action by the plaintiff against it, notwithstanding a demand had been made by the plaintiff upon the bank prior to the adjudication.

From the Montgomery Circuit Court.

M. E. Clodfelter, T. E. Ballard, E. E. Ballard and G. D. Hurley, for appellant.

G. W. Paul, J. E. Humphries and W. M. Reeves, for appellee.

ELLIOTT, J.—Joseph Glaze and Susanna Glaze were husband and wife prior to August 30th, 1878, and that relation continued until January 9th, 1885. On the day first mentioned, they bought of Robert Butler seventy acres of land,

Glaze v. The Citizens National Bank of Crawfordsville.

and the deed executed to them by their grantor conveyed the land to them as tenants by entireties. They sold the land to Asa M. Pickens, and he, in part payment of the purchase-money, gave Susanna a check for \$1,580, and endorsed to Joseph two checks amounting in the aggregate to \$1,500. Within a few minutes after Joseph and Susanna received the checks, the latter took from the former, against his wish, the two that had been delivered to him. These she took to the appellee and deposited them, together with that executed to her, to her own credit. On the 15th day of January, 1884, and while the money was still in the bank to the credit of Susanna, the appellee notified the officers of the bank that \$1,500 of the amount belonged to him. On the 22d day of the same month, the appellee paid to Susanna the full amount deposited by her. After she received the money she brought suit for divorce against Joseph and a decree was entered divorcing her from him. On the 12th day of March, 1885, he brought suit against his divorced wife to recover the money obtained by her, alleging in his complaint that she had forcibly taken the checks from him.

She answered, asserting title to the money and averring that she had obtained a decree of divorce. Upon this answer she defeated the appellant. On these facts, which are embodied in a special finding, the court stated conclusions of law and gave judgment in favor of the appellee.

The trial court did not err in holding that the appellant was not entitled to recover the money deposited by Susanna Glaze. The appellant was bound to show that he had title to the money when he instituted this action. A plaintiff can not recover upon the weakness of his adversary's title, but must recover upon the strength of his own. If, therefore, the appellant had no title to the money he claims at the time he commenced this action, it must fail. That he had no title was settled by the decree in the suit brought by Susanna Glaze. At that time she had the money and was asserting title to it, and the decree in the divorce suit pre-

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cludes the appellant from laying claim to money or property held by the wife under a claim of title. *Nicholson v. Nicholson*, 113 Ind. 131; *Evans v. Evans*, 105 Ind. 204; *Behrley v. Behrley*, 93 Ind. 255; *Rose v. Rose*, 93 Ind. 179, and cases cited. The money had, indeed, long before become the money of the bank, and Susanna was its creditor. *McLain v. Wallace*, 103 Ind. 562; *Harrison v. Wright*, 100 Ind. 515.

Whether the case be regarded as one in contract or in tort is immaterial, for, as the decree in the divorce suit finally and conclusively adjudicated all property questions, it confirmed in Mrs. Glaze a right to the property she then claimed.

The question, however, does not turn on the decree in the divorce suit alone, for the judgment in the action subsequently brought by the appellant adjudged that Mrs. Glaze was entitled to the money. This was an adjudication upon the title, and on that question is conclusive. If the judgment had not been exclusively upon that question, then it is probably true that it would not have been available to the appellee, but it was on that question and it is available to the appellee, since it establishes title in a third person. We think it clear that where, as here, a plaintiff brings an action asserting title, and the defendant by an affirmative answer asserts title in himself, and on that answer has judgment, that judgment establishes title in him.

It is argued that the demand fixed the liability of the bank, and that this entitles the appellant to a recovery. In support of this position, counsel cite *Merrill v. Bank of Norfolk*, 19 Pick. 32, but it is not in point, for it does not touch the question which is here of governing force. The question here is, did the appellant have title when he brought this action? If he did not, then his demand was fruitless. A demand by a party who has no title can not create a cause of action. But before the demand was made, the bank stood as the debtor of Mrs. Glaze, and at the time this action was brought property rights had been settled by a final judgment.

We do not deem it necessary to follow counsel in their ar-

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gument, for the only relevant and material question that the record presents is involved in the general inquiry, whether the court justly applied the law to the facts, and, that question decided, all the incidental questions in the case are disposed of, and we decide that question by holding that when this action was commenced the appellant had no title to the property in dispute.

Judgment affirmed.

Filed Nov. 9, 1888; petition for a rehearing overruled Jan. 9, 1889.

No. 14,695.

ROSS v. THE STATE.

CRIMINAL LAW.—Indictment.—Variance.—Where an indictment for the unlawful sale of intoxicating liquor charges that the sale was made to William Lankford, Jr., but the evidence proves that it was made to William H. Lankford, the variance is not fatal.

SAME.—Supreme Court.—Evidence.—Where there is evidence in the record tending to support every material charge in such indictment, the Supreme Court will not interfere with the finding of the court below.

SAME.—Intent.—Harmless Error.—A defendant in a criminal case may testify to the intent with which the offence was committed, but when he has testified fully as to the intention, and the inquiry seeks to elicit an immaterial fact, it is not error for the court below to sustain an objection to a question as to his intention.

From the Knox Circuit Court.

W. A. Cullop and C. B. Kessinger, for appellant.

L. T. Michener, Attorney General, O. H. Cobb, Prosecuting Attorney, and J. C. Adams, for the State.

COFFEY, J.—In this case the appellant was indicted, tried

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and convicted for an unlawful sale of intoxicating liquor to William Lankford, Jr., who was, at the time of such sale, under the age of twenty-one years. From the judgment of conviction he has appealed to this court, and has here assigned as error the overruling of his motion for a new trial.

The first contention of the appellant is, that there is a fatal variance between the indictment and the evidence in the cause. The supposed variance consists in this: It is charged in the indictment that the sale was made to William Lankford, Jr., while the evidence proves that it was made to William H. Lankford.

This has been held not to be a fatal variance. *Foltz v. State*, 33 Ind. 215; *Choen v. State*, 52 Ind. 347; *Miller v. State*, 69 Ind. 284.

It is also contended by the appellant that the finding of the court below is not sustained by sufficient evidence.

If a person sells intoxicating liquor to one having the appearance of being of full age, he is not liable to criminal prosecution if such sale be made in good faith, after due caution and in the honest belief that the purchaser is an adult, though in fact he is a minor. *Goetz v. State*, 41 Ind. 162; *Payne v. State*, 74 Ind. 203; *Hunter v. State*, 101 Ind. 241; *Kreamer v. State*, 106 Ind. 192.

As to Lankford's age, there is no conflict in the evidence. It may be conceded that at the time of the sale he was a minor.

The controversy on the trial related to his appearance and to the caution used by the appellant. Upon this branch of the case there is much conflict in the evidence. There is evidence in the record tending to support every material charge in the indictment. In such case this court will not interfere with the finding of the court below.

It is further contended that the circuit court erred in excluding certain evidence offered by the defendant on the trial. It appears by the record that the defendant testified as a witness in his own behalf.

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After testifying that Lankford had the appearance of being a man of full age, that he had told him he was of age, and had voted at the preceding April election for township trustee, that he had exercised due care and caution to ascertain the age of the purchaser, and had sold him the liquor charged in the indictment in good faith, believing him to be over twenty-one years old, his counsel propounded to him this question: "Had you any intention of violating the law in making the sale to Lankford, as charged in the indictment?"

To this question the court sustained an objection, to which action of the court the appellant excepted.

Before defendants in criminal cases were permitted to testify in their own behalf there were no means of ascertaining the intent with which they did any particular act, except as it could be inferred from the facts and circumstances attending it. The intent, however, was always a fact necessary to be established where it constituted an essential element in the crime charged. Now that defendants are permitted to testify in their own behalf there can be no valid reason assigned why they should not be allowed to testify to the intent with which any act was done, where such intent is a fact necessary to be ascertained.

It is believed that there is no authority holding that they may not do so. 7 Criminal Law Magazine, 273; 22 Central Law Journal, 271; *Greer v. State*, 53 Ind. 420; *Over v. Schiffling*, 102 Ind. 191; *White v. State*, 53 Ind. 595.

But in this case, as we have seen, the appellant, before the question above set out had been propounded to him, had fully testified as to his intention, so far as such intention was a material fact in his case. Furthermore, the question is in itself objectionable. It seeks to elicit an immaterial fact. It was not important to know whether the defendant intended to violate the law, for he might have been ignorant of its provisions. The material question was, did he intend to do

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that which the law prohibits. We do not think the court erred in sustaining the objection to this question.

We find no error in the record for which the judgment below should be reversed.

The judgment is affirmed.

Filed Jan. 10, 1889.

116	498
119	530
116	498
129	64
129	256

116	498
133	394

116	498
143	261

116	498
144	575
146	229

116	498
152	497

116	498
166	203
166	204

116	498
166	452
166	454

116	498
171	384

116	498
171	384

116	498
171	384

 No. 14,260.

HOOPER ET AL. v. HOOPER.

WILL.—Vested Remainder.—Survivorship.—Where a devise of land is to a widow during her natural life, and at her death to the son of the testator, if he be living, and if he be dead then to his widow until her death or marriage, and at her death or marriage then to his heirs, and, if there be no heirs living to the heirs of the testator, the words of survivorship relate to the death of the testator, and the son takes an estate in fee simple in remainder, which vests immediately upon the death of the father, but which he can only enjoy in possession after the termination of the life estate of his mother. Upon a conveyance of the life estate to the son by the mother, the former would become entitled to possession of the land.

From the Marion Circuit Court.

J. S. Duncan, C. W. Smith and J. R. Wilson, for appellants.

W. N. Harding and A. R. Hovey, for appellee.

MITCHELL, J.—The only question presented for consideration in this case involves the construction of the second clause of the last will and testament of Daniel Hoover, late of Marion county, deceased. By the first clause of his will the testator bequeathed all of his personal goods and chat-

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tels to his "beloved wife, Elizabeth Hoover, to be hers for and during the period of her natural life." The second clause is in the following language: "Item 2. I further give and devise to her (his wife Elizabeth), all my real estate, which consists of the farm we now live on, in Wayne township, Marion county, State of Indiana, to be hers for and during her natural life, and, at her death, said real estate to pass in fee simple, in equal portions, to my son, Andrew Hoover, and my daughter, Hattie. The east half of said farm to go to my son, Andrew, if he be living, and if he be dead, then to his widow until her death or marriage, and at her death or marriage, then to go to his heirs, and if there be no heirs living, then said land shall pass to the heirs of Daniel Hoover. The west half of said farm, at the decease of my wife, shall pass to and be the property of my daughter, Hattie, she to have and to hold the same forever, and at her death to her heirs, or, if she has no heirs, to be disposed of by her as she desires."

The testator died on the 12th day of May, 1882, leaving as heirs, surviving devisees and legatees, his widow, Elizabeth Hoover, his son and daughter, Andrew P. and Hattie Hoover, and one other child for whom provision was made in the will. At the time of the testator's death, Andrew P. Hoover had a wife and two children, who are still in life.

The widow elected to take under the will, which had been duly admitted to probate. Afterwards, on the 20th day of January, 1888, she conveyed to Andrew P. Hoover all her interest and estate in a portion of the land so devised to him as above. The latter subsequently instituted this suit, making his mother, wife and children, and others, parties, alleging in his complaint that the defendants were asserting some claim to the land, and asking as relief that his title to the real estate devised by the item of the will above set out should be quieted in him.

The plaintiff had a judgment and decree below according

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to the prayer of his complaint, and to reverse this judgment this appeal is prosecuted.

On the one hand it is contended, in effect, that by the devise above set out, Andrew P. Hoover, immediately upon the death of the testator, took an estate in fee simple in the east half of the farm described in the will, subject only to the life-estate of his mother, the estate so taken being, as is claimed, a vested remainder.

In opposition to this theory the appellant contends that the devise created for Andrew P. Hoover a contingent remainder, which was to become vested only in the event he survived his mother; or, that if he took any estate which vested upon the death of the testator, it was upon the express condition that if he did not survive his mother the estate which he took should be divested in favor of, and become vested first in, his widow, in case she should be living, and if not, then in the other devisees, in the order named in the will. Hence it is argued that during the lifetime of his mother, the life-tenant, the plaintiff, has no such vested or indefeasible interest in the land as entitles him to maintain an action to quiet his title. This latter view is not, in our opinion, tenable.

The case is not distinguishable in principle from the well considered case of *Harris v. Carpenter*, 109 Ind. 540, wherein it was held, in construing a will which gave to the testator's widow a life-estate in certain land, and then provided that at her death it should be the property of, and pass to, his daughter in fee simple, in case she was living, and if not, then to her heirs forever, that the survivorship provided for had reference to the time of the death of the testator, and that upon his death the daughter, who was then in life, became seized of a vested remainder in fee. The case is well supported upon principle and by authority, and controls our judgment in the present case. See, also, *Allen v. Mayfield*, 20 Ind. 293; *Rush v. Rush*, 40 Ind. 83; *Petro v. Cassidy*, 13 Ind. 289; *Wood v. Robertson*, 113 Ind. 323.

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Accepting the position as established, that words of survivorship in a will, unless there is a manifest intent to the contrary, always relate to the death of the testator, and that, in the absence of a contrary intent, a will always speaks as from the date of the testator's death, there can be no doubt but that Andrew P. Hoover took an estate in fee simple in remainder, which vested immediately upon the death of his father, but which he could only enjoy, in possession, after the termination of the life-estate of his mother. An estate in remainder is not rendered contingent by the uncertainty of the time of enjoyment. The right and capacity of the remainderman to take possession of the estate, if the possession were to become vacant, and the certainty that the event, upon which the vacancy depends, must happen sometime, and not the certainty that it will happen in the lifetime of the remainderman, determine whether or not the estate is vested or contingent. *Croxall v. Shererd*, 5 Wall. 268; *Tiedeman Real Prop.*, section 401. Having taken a conveyance from the life-tenant, thus terminating her estate in a portion of the farm, there can be no doubt of the appellee's right to maintain an action now, as to that part of the land, at least.

The application of the principles above enumerated leads to the conclusion that the judgment must be affirmed.

The judgment is accordingly affirmed, with costs.

Filed Jan. 11, 1888.

No. 13,219.

PAPE v. WRIGHT.

PATENTED RIGHTS.—*Validity of Statute.*—The statute regulating the sale of patented rights is valid.

SAME.—*Broker.*—*Commission.*—*Illegal Act of Principal.*—Where a party employs a broker to procure a purchaser for patented rights, such broker, upon procuring such purchaser, is entitled to his commission whether a sale was made or not, although his principal had not complied with the statute regulating the sale of patent rights, the broker having no knowledge of any intention on the part of his employer to violate the law.

DEPOSITION.—*Seal of Notary.*—*Clerk's Certificate.*—Where a notary public in a foreign State, taking a deposition, omitted his seal from the certificate, but the clerk of the county, by a proper certificate, attested to the official character and signature of the notary, there is no cause for suppressing the deposition.

SAME.—*Notice.*—*Motion to Suppress.*—*Practice.*—Where a party accepts service of notice without objecting, he can not be heard in the Supreme Court to say that the notice was insufficient. If the notice is not sufficient to authorize the taking of the depositions of all the witnesses, there should be a motion to suppress the deposition not authorized, although the court may, without error, on a motion to suppress all, suppress the one improperly taken; but a party is entitled to this only as a matter of favor.

EVIDENCE.—*Impeachment.*—*Character.*—Evidence impeaching the character and reputation of a witness at the time he left his former residence, the time being reasonably near the examination—about two months before—is admissible.

From the Allen Superior Court.

L. M. Ninde, for appellant.

A. A. Chapin, W. S. O'Rourke, — *Spencer* and — *Jenkinson*, for appellee.

ELLIOTT, C. J.—The complaint upon which this cause was tried alleges that the appellant employed the appellee to procure purchasers for patented rights of which he was the owner, and promised to pay the appellee a commission as compensation for his services; that the appellee did procure purchasers,

116	502
118	41
118	254
122	532
123	159
116	506
127	27
127	227
116	502
130	332
116	502
131	491
116	502
142	156
116	502
148	282
150	390

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and that the appellant sold the rights to the purchasers procured by the appellee.

The answer of the appellant is in three paragraphs; the first is a general denial, and the second a plea of payment.

The third contains these facts: At the time the contract was entered into, the purchasers procured, and the rights sold, neither the defendant nor the plaintiff, nor any other person, had filed with the clerk of the court of Allen county copies of letters patent, nor had they, or any one, made an affidavit that the letters patent were genuine. To this answer a demurrer was sustained.

The validity of our statute regulating the sale of patented rights has been repeatedly affirmed by this court. It is with us no longer an open question. *Fry v. State*, 63 Ind. 552; *Toledo Agricultural Works v. Work*, 70 Ind. 253; *Brechbill v. Randall*, 102 Ind. 528; *New v. Walker*, 108 Ind. 365; *Hankey v. Downey*, *ante*, p. 118.

We collected and examined the authorities in *New v. Walker*, *supra*, and we shall not again discuss them further than to refer to a very recent case decided by the Court of Appeals of New York, where the doctrine of *New v. Walker*, *supra*, was approved. *Herdie v. Roessler*, 109 N. Y. 127. It was said in the course of the opinion in that case: "But the law of Congress and the State law are not in conflict. The object of one is to secure to the inventor an exclusive right to use or sell his invention, and the object of the other is to protect against fraud in sales."

If the question of the sufficiency of the answers depended solely upon the validity of our statute, we should have no hesitation in adjudging the answer good; but affirming the validity of the statute does not lead to an affirmance of the sufficiency of the answer.

The case is a peculiar one. The plaintiff was employed to procure purchasers for patented rights. He was not employed to sell, but to furnish purchasers. He was acting as a broker, and as such was entitled to his commission when he

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furnished a purchaser, whether a sale was consummated or not. Brokers who undertake to find purchasers earn their commissions when they bring to their principal a person willing and ready to buy. *Love v. Miller*, 53 Ind. 294; *Vinton v. Baldwin*, 88 Ind. 104, and cases cited; *Fischer v. Bell*, 91 Ind. 243; *McClave v. Paine*, 49 N. Y. 561 (10 Am. R. 431).

The question is, not whether it was illegal to sell, or offer to sell, patented rights, but whether it was illegal for the broker to attempt to find a purchaser, for, as the pleadings present the facts, the broker was not authorized to make a sale, nor was he requested to sell. All that he was engaged to do was to procure some one to buy. He was not, therefore, an agent authorized to sell, but was what the authorities denominate a middleman. *Alexander v. North-Western Christian University*, 57 Ind. 466; *Vinton v. Baldwin*, *supra*; *Redfield v. Tegg*, 38 N. Y. 212; *Rowe v. Stevens*, 53 N. Y. 621; *Rupp v. Sampson*, 16 Gray, 398; *Barry v. Schmidt*, 27 Alb. L. J. 297.

The office of a middleman is to bring the parties together, leaving to them the consummation of the sale, and he does not sell, or offer to sell, but simply sets in train preliminary negotiations. If a middleman is entitled to compensation when he procures a purchaser, then he can enforce his contract, notwithstanding the fact that his employer violates the law, for its enforcement does not require that he shall bring to his assistance the illegal contract of selling, or offering to sell, patented articles. The rule upon the general subject is that a recovery may be adjudged whenever it can be reached without the aid of an illegal contract. *Louisville, etc., R. W. Co. v. Buck*, *post*, p. 566; *Sondheim v. Gilbert*, 117 Ind. 71.

In the case of *Planters' Bank v. Union Bank*, 16 Wall. 483, the rule was declared to be substantially that stated by us, the court saying: "The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them." Other decisions approve this doctrine.

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Brooks v. Martin, 2 Wall. 70; *Cook v. Sherman*, 20 Fed. Rep. 570; *Burke v. Flood*, 6 Saw. 220; *Lehman v. Strassberger*, 2 Woods, 554.

Closely analyzing the pleadings, and recapitulating somewhat, we shall find these elements present: That the undertaking was to find a purchaser; that the appellee had no knowledge of any intention on the part of his employer to violate the law; that the employer has had the benefit of the appellee's services, and that a recovery may be enforced without validating the illegal acts of the appellant. These elements are important, for they discriminate the case from that of an agent joining with his principal in a known illegal act; they mark it as a case where the principal is seeking to use his own wrong to escape payment for services rendered at his request, and they prove it to be a contract not blended with the illegal conduct and purpose of the wrongdoer. The question is not what are the rights of the public as against the appellee, but the question is as to the rights of a principal upon whom chiefly and primarily rested the duty of performing the acts required by the law as against a middleman who has done what the principal employed him to do. Proceeding upon the general principles we have stated, and guided by the authorities we have cited, our course, if we kept in the straight path marked out by them, would lead us, even without decisions more directly in point, to the conclusion that the answer is bad. But our search for direct decisions has not been unrewarded, for we have found cases strongly in point. In the case of *Crane v. Whittemore*, 4 Mo. App. 510, it was held that "A broker may recover his commissions for services rendered in finding a purchaser for certain goods, even though the contract of sale between the buyer and seller, made after the broker's services were performed, was immoral and against public policy as a wager contract; nor is the question affected by the broker's knowledge of the character of the contract, he not being a party thereto." The case which we cite is a much stronger case than the one

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before us, especially in the particular that the broker had knowledge of the illegal character of the transaction. Here, we can not assume knowledge, for the presumption is in favor of obedience to law and in favor of fair dealing. *Curtis v. Gokey*, 68 N. Y. 300. In another particular the case cited is stronger than the present, for there, both parties to the illegal contract were wrongdoers, while here, the purchaser procured by the broker was guilty of no wrong, although the seller was.

In the case of *Ormes v. Dauchy*, 13 Jones & S. 85, it was held that a broker who brought parties together might recover his commissions, although the contract entered into between the parties brought together by him was for advertising a lottery, and such advertisements were forbidden by statute. The court there said of the contract of the brokers: "Their engagement was ended when they introduced the parties to each other, and the law allows them compensation for that particular service. The contract of the plaintiff was, in itself, therefore, lawful and free from vice, and I do not see how it can be avoided on the ground that it may have possibly facilitated an illegal transaction. It is impossible to foresee where the doctrine would carry us should it be held that the broker's contract is void because it may have some remote connection with other unlawful contracts. I am not aware of any principle which could justify this."

It is possibly true that the court pushed beyond its just limits, in applying it to the facts of the case before it, the general rule it stated. *Ormes v. Dauchy*, 82 N. Y. 443 (37 Am. Rep. 583). But granting this, still the rule remains in its integrity and must apply where, as here, the duties of the broker were at an end before any illegal act was done with which he was directly or remotely connected; for here, no act of his was illegal, nor did it, by any wrong of his, facilitate in legal contemplation the performance of an illegal act by his employer. In the case cited, the law positively prohibited the act which the broker brought the parties together

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to perform, while here, the act was not prohibited, but might lawfully be performed by one who had complied with the statute. Here there was no general prohibition, but simply a regulation of the mode of procedure by venders of patented rights. If the sale of patented rights had been absolutely prohibited (supposing such a thing legally possible), there would be plausibility in the theory that a broker could not do any act toward bringing about a sale, for then the case would be within the rule laid down in such cases as *Biggs v. Lawrence*, 3 Term R. 454; *Clugas v. Penaluna*, 4 Term R. 466. But, as the vending of such rights is not unlawful where the statute is complied with, the appellee was not necessarily a participant in the wrong of his employer. The case falls far within the rule declared in such cases as *Pellecat v. Angell*, 2 Crompt. M. & R. 311; *Faikney v. Reynous*, 4 Bur. 2009; *Holman v. Johnson*, Cowp. 341.

As there was a general right to sell the patented rights, and as no considerations of public policy condemn the sale of such rights, sales of them are not in themselves unlawful, but only become so when made by one who has failed to do what the statute commands, and the appellee was, therefore, not bound to assume that his employer would violate the law, but against his employer, at least, the appellee had a right to assume that he would do, or had done, what the law requires. Wald's Pollock Contr. 329.

We do not, of course, question the soundness of the general rule that one who contracts to do an illegal act, or to aid in doing a wrong, can not recover compensation for his services; on the contrary, we affirm as strongly as possible the justice of that rule, but we quite as strongly deny its applicability to such a case as is here presented by the pleadings properly before us.

To apply the general rule to a case like this would result in constituting every broker a censor and guardian of his employer, and, in every case where the subject of the sale was a patented right, impose upon him the duty of ascertain-

ing that his employer was not a lawbreaker, and all for the benefit of the employer who repudiates his obligation, and endeavors to get the benefit of his broker's services without paying him any compensation. Not all general rules apply to every case, for resembling cases may fall within special rules or within exceptions to general rules.

Depositions were taken by a notary public in the State of New York, but the certificate is not authenticated by his seal. There is, however, a certificate of the clerk of the county, duly attested by a seal, wherein it is recited, among other things, that the notary before whom the depositions were taken, "was duly commissioned and sworn; that all of his official acts as such are entitled to full faith and credit, and that his signature thereto is genuine." In the face of the certificate of the clerk we can not hold that the lack of a notarial seal constituted a sufficient cause for suppressing the depositions. If there had been no certificate from the clerk a very different case would be presented.

The notice thus names the witnesses whose depositions are to be taken: "G. R. Bickford and Mrs. Bickford," and we think that, after having accepted service of the notice without objecting, the appellant can not be heard to say that the notice is insufficient.

If the depositions of two witnesses are taken, and the notice is sufficient to authorize the taking of the deposition of only one of them, the proper practice is to move to suppress the deposition not authorized by the notice. A motion to suppress the depositions of both may, without error, be overruled, although the court might, as a matter of favor and of its own volition, suppress the one improperly taken, but a party is entitled to this only as matter of favor, and not as of right.

It is a principle running through many matters of practice that an objection must not cover both competent and incompetent testimony, but must separate the incompetent from the competent. *City of Terre Haute v. Hudnut*, 112 Ind. 542;

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Day v. Henry, 104 Ind. 324; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409; *St. Louis, etc., R. W. Co. v. Hendricks*, 48 Ark. 177 (3 Am. St. R. 220); *Wallis v. Randall*, 81 N. Y. 164; *Smoot v. Eslava*, 23 Ala. 659 (58 Am. Dec. 310).

About the 25th of September, 1885, one of the appellee's witnesses removed from Fort Wayne to the State of New York, where his deposition was taken on the 24th day of the following November. The appellant offered evidence of the character and reputation of the witness at the time he left Fort Wayne, for the purpose of impeaching his credibility, but the court excluded it. This was a material error, and compels us to reverse the judgment. The evidence offered was relevant, was material, and was competent. The witness sought to be impeached gave very important testimony, and if it could have been overthrown a very essential point would have been gained by the appellant.

We can conceive of no valid reason for excluding the proffered evidence. It is true that an impeaching question should fix a time reasonably near the time the deposition is taken, but it is not necessary that it should fix that precise time. *Rucker v. Beaty*, 3 Ind. 70.

Counsel for the appellee say: "But in the present case the witness had been a non-resident of Fort Wayne for nearly two months, and no attempt was made to show what his character was at his then place of residence."

To our minds this statement makes clear the error of the trial court. If sixty days' residence can give a man a reputation in his new home, his conduct must be exceedingly good, or notoriously bad, to enable the persons there residing to acquire sufficient knowledge to enable them to swear that they knew his reputation; but it is not to extraordinary things that the law looks. The law is a practical science, and deals with ordinary things, and not extraordinary ones, and regards what is ordinarily reasonable and of ordinary occurrence. It is reasonable in this instance to assume that the character and reputation of the witness had not changed

within two months. If it were otherwise a roving witness could not acquire a reputation that would benefit him in time of need, or justly rise up against him when justice required. The decisions which speak of the time to which impeaching questions should be directed must be understood to mean a reasonable time. It can not be possible that they must be directed to the very hour, day, week or month of the examination; all that is necessary is that, giving due consideration to attendant circumstances, the questions should designate a time reasonably near the time of the examination. Our position is so strongly entrenched in reason that we hardly feel it incumbent to call authorities to our aid, but, as it is easy to do so, we do call to our support some of the many cases. *Memphis, etc., Co. v. McCool*, 83 Ind. 392; *People v. Abbott*, 19 Wend. 192; *Dollner v. Lintz*, 84 N. Y. 669.

We do not affirm that it is sufficient to fix a remote time, but what we do affirm is that it is only necessary to fix a time reasonably near the date of the examination. Reputation seldom grows in weeks or months, but is the product of time, and we can not hold, as we should be compelled to do to support this judgment, that a reputation is ordinarily gained or lost in sixty days; on the contrary, we are firmly convinced that a man who goes to a new home, leaving a bad reputation at his old, can not so effectually cast off that reputation in his sixty days' residence at his new abode as to prevent its being given in evidence against him.

Judgment reversed, with instructions to sustain the motion for a new trial.

Filed Jan. 11, 1889.

Gipe *et al.* v. Cummins.

No. 13,477.

GIPE ET AL. v. CUMMINS.

LANDLORD AND TENANT.—*Forcible Detention.—Proof.—Jury.—Verdict.—*

Where a complaint charges a peaceable entry upon real estate, and a forcible detention thereof, before the plaintiff can recover he must prove that the defendant holds the possession either by actual violence or such a show of force as is reasonably calculated to intimidate the plaintiff; and on failure of such proof the court may direct the jury to return a verdict for the defendant.

EVIDENCE.—*Objection.—Exception.—*The exclusion of testimony can only be made available by asking a pertinent question of a witness on the stand, and if objection is made, stating to the court what testimony the witness will give in answer to the question proposed, and, if the objection is sustained, reserving an exception.

From the Madison Circuit Court.

H. D. Thompson, W. A. Kittinger and E. F. Dailey, for appellants.

G. M. Ballard, C. Greenlee, C. L. Henry and H. C. Ryan, for appellee.

BERKSHIRE, J.—This action originated before a justice of the peace, who tried the cause and rendered judgment for the appellee.

The appellants appealed to the circuit court and there the case was tried before a jury and a verdict returned for the appellee; they filed a motion for a new trial which the court overruled and the proper exception was entered, after which the court rendered judgment for the appellee.

The action is controlled by section 5237, R. S. 1881.

The charge made by the complaint is a peaceable entry upon real estate and a forcible detention thereof.

The brief of counsel for the appellants contains some strictures upon the judge who presided at the trial, which we desire to refer to before considering the case. What is said is in bad taste and does not meet with the approbation

116	511
122	900
116	511
139	86

116	511
153	608

116	511
154	590
154	636

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of this court. But to proceed with the consideration of the cause.

After the evidence had all been introduced and the argument of counsel to the jury concluded, the court directed the jury to return a verdict for the defendant.

The court may, in a proper case, direct the jury to return a verdict for the defendant. *Washer v. Allensville, etc., T. P. Co.*, 81 Ind. 78; *Weis v. City of Madison*, 75 Ind. 241; *Purcell v. English*, 86 Ind. 34.

The court may, under some circumstances, direct a jury to return a verdict for the plaintiff, even where the plaintiff has the burden of the issue. *Gaff v. Greer*, 88 Ind. 122; *Beckner v. Riverside, etc., T. P. Co.*, 65 Ind. 468.

Whenever there is an entire failure of proof as to any material fact, the establishment of which is necessary to the plaintiff's recovery, it is not only right but entirely proper that the court direct the jury to return a verdict for the defendant. *Steinmetz v. Wingate*, 42 Ind. 574; *Kline v. Spahr*, 56 Ind. 296; *Moss v. Witness Printing Co.*, 64 Ind. 125; *Hazard v. Citizens State Bank*, 72 Ind. 130; *Williamson v. Yingling*, 80 Ind. 379; *McClaren v. Indianapolis, etc., R. Co.*, 83 Ind. 319; *Dodge v. Gaylord*, 53 Ind. 365.

In cases belonging to the class to which this one belongs, before the plaintiff can recover he must prove that the defendant holds the possession either by actual violence or such a show of force as is reasonably calculated to intimidate the plaintiff. *Archev v. Knight*, 61 Ind. 311; *Judy v. Citizen*, 101 Ind. 18; *O'Connell v. Gillespie*, 17 Ind. 459; *Kiphart v. Brennemen*, 25 Ind. 152.

The evidence is in the record, and we have given it a careful examination. There is an entire absence of evidence tending to show force or intimidation. The following is the state of facts disclosed:

On the 20th day of January, 1885, the appellee was a constable, and had a *feri facias* in his hands against the property of one Jesse Niesel, which he levied upon certain

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property in the possession of the appellants that was in a store-house located upon the premises in controversy. After the levy had been made, and to save any trouble and inconvenience which might attend a removal of the property, the appellants voluntarily consented to turn the possession of the store-house over to the appellee and gave him the keys thereto. After some days the appellants made a demand upon the appellee for a return of the possession of the store-house to them. The appellee refused to surrender the possession, and held it at the time this suit was brought, peaceably and quietly so far as the evidence discloses.

The principal element in this character of action being the retention of possession by force, the court below committed no error in directing the jury to return a verdict for the defendant.

Upon the trial there was some testimony offered by the appellants which the court rejected. The rejected testimony did not tend to prove force on the part of the appellee in holding possession of the property, and, had it been admitted, the result of the trial must have been the same.

Again, the record does not properly present the question for the consideration of this court.

The exclusion of testimony can only be made available by asking a pertinent question of a witness on the stand, and if objection is made, stating to the court what testimony the witness will give in answer to the question proposed, and if the objection is sustained, reserving an exception. *Lewis v. Lewis*, 30 Ind. 257; *Higham v. Vanosdol*, 101 Ind. 160; *Judy v. Citizen*, *supra*.

Counsel for the appellants did not thus present any question as to the rejection of testimony.

The judgment of the court is affirmed, with costs.

Filed Jan. 11, 1889.

VOL. 116.—33

Durham v. The State.

No. 14,314.

DURHAM v. THE STATE.

TAXES.—Returning False List.—Penalty.—One who returns a false and fraudulent tax list is liable to the penalty prescribed in section 6339, R. S. 1881, and must be prosecuted in the mode therein prescribed, and not by indictment.

From the Montgomery Circuit Court.

P. S. Kennedy and *S. C. Kennedy*, for appellant.

A. B. Anderson, Prosecuting Attorney, for the State.

ELLIOTT, J.—The indictment in this case charges that the defendant gave to the assessor a false and fraudulent tax list, and specifies the particular in which it was false and fraudulent. There was, therefore, some list, and as there was some list, the defendant is liable to the penalty prescribed in section 6339, R. S. 1881, and must be prosecuted in the mode therein prescribed, and not by indictment. He can not be prosecuted by indictment under that section. A defendant may be prosecuted by indictment under section 2150, where there is an unlawful failure or refusal to return any list at all, but not where a list is returned, although it is a false and fraudulent one. *Burgh v. State, ex rel.*, 108 Ind. 132; *State, ex rel., v. Lauer, ante*, p. 162; *Durham v. State*, 117 Ind. 477.

Judgment reversed, with instructions to quash the indictment.

Filed Jan. 10, 1889.

Wheeler v. Hawkins, Assignee, et al.

No. 12,974.

WHEELER v. HAWKINS, ASSIGNEE, ET AL.

VOLUNTARY ASSIGNMENT.—Assignee.—Contract.—Consideration.—Waste.—Sureties.—Subrogation.—Practice.—Judgment.—Where an assignee in a voluntary assignment, without authority but in good faith, paid out of the general fund interest due on a mortgage on the trust estate, upon the parol agreement that if the court or general creditors refused to ratify it, the money was to be repaid, such use of the fund was a waste of the estate for which he became liable on his bond to the general creditors, and upon payment thereof by the sureties of such assignee, they became subrogated to the rights of such creditors and the assignee, and were entitled to enforce the agreement, which was supported by sufficient consideration against the mortgagee, and for that purpose could properly be admitted as co-plaintiffs with such assignee and recover a joint judgment against such mortgagee.

From the Marshall Circuit Court.

W. B. Hess and *D. McDuffie*, for appellant.

A. C. Capron and *H. Corbin*, for appellees.

COFFEY, J.—This cause, when commenced, was an action by John P. Hawkins, assignee of Thomas Shakes, against Amzi L. Wheeler, for the recovery of money.

Hawkins obtained judgment, but upon an appeal to this court the judgment was reversed for insufficiency of the complaint, and the cause was remanded for further proceedings. *Wheeler v. Hawkins*, 101 Ind. 486.

After the cause was remanded Hawkins filed an amended complaint, which charged that, on the 11th day of February, 1874, Thomas Shakes, an insolvent debtor, made a voluntary assignment of all his property to the plaintiff for the benefit of his creditors, under the provisions of the act of March 5th, 1859; that the deed of assignment, a copy of which was filed with the amended complaint, was recorded in due time in the county of Marshall, in this State, where Shakes resided and where the property was situate; that the said Hawkins gave

116	515
120	391
123	269
116	515
134	220

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bond and qualified as the assignee and trustee of the said Thomas Shakes, Horace Corbin, Albertus C. Capron, George R. Reynolds and Alexander C. Thompson becoming sureties on his bond, after which he took charge of the estate so assigned to him; that a part of the property so conveyed to him by the deed of assignment was one hundred and sixty acres of land, described in the complaint, and situate in said county of Marshall, upon which the defendant, Wheeler, held a mortgage securing notes amounting in the aggregate to the sum of four thousand dollars, executed by the said Thomas Shakes, Daniel E. Van Valkenburgh and Lawrence Shakes to the defendant for a part of the purchase-money of said land; that the plaintiff, Hawkins, proceeded to convert the personal property assigned to him into money, and deposited the proceeds in the Plymouth bank, an institution owned and controlled by the defendant; that a large number of unsecured claims, amounting in the aggregate to ten thousand dollars, were filed and allowed against the estate of the said Thomas Shakes; that the defendant did not file his notes against the estate, but continued to hold the same as secured claims; that the plaintiff, at the time, believed the equity of redemption in the mortgaged lands to be of considerable value, and having been notified by the defendant that one thousand dollars of the mortgage debt was due and the foreclosure of the mortgage imminent, and the defendant having proposed that if he, the plaintiff, would, out of the trust funds in his hands, pay the interest due on the notes secured by the mortgage and six hundred dollars of the amount due on the principal sum, he, the defendant, would withhold foreclosure, and give him, the plaintiff, further time to sell the land and realize, if possible, something in that way for the general creditors; the plaintiff accepted the proposition of the defendant, and, accordingly, on the 25th day of August, 1874, paid to the latter, out of said trust funds, the interest due on the mortgage debt, and six hundred dollars on the principal, amounting in all to nine hundred and forty-one

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dollars and fifteen cents; that at the time of such payment the defendant well knew that the same was paid out of the trust fund in the hands of the plaintiff belonging to the estate of the said Thomas Shakes, and that the plaintiff had no right to make such payment on the mortgage notes; that when the payment was made the defendant agreed that if the general creditors should become dissatisfied with it, and should object to it, or if the court should refuse to ratify such payment, he would, on demand, pay the amount of money thereby received by him back to the plaintiff; that from said 25th day of August, 1874, to the time of the commencement of this suit, the plaintiff was unable to sell the mortgaged lands for anything in excess of the mortgage lien; that the defendant, on or about the 1st day of January, 1876, commenced an action in the Marshall Circuit Court to foreclose his mortgage, and that the mortgaged lands at the time did not exceed in value the balance due on the mortgage debt, including the costs of foreclosure; that the entire assets which had come into the plaintiff's hands did not exceed in value the sum of three thousand dollars; that there would, consequently, be a large deficiency of assets for the payment of the general creditors of the estate; that the payment made to the defendant as herein above stated was without the knowledge or consent of the general creditors; that the defendant, upon demand, had refused to repay or return said sum of nine hundred and forty-one dollars and fifteen cents, or any part thereof. Wherefore judgment was demanded.

The defendant demurred to this amended complaint, but his demurrer was overruled.

After filing the foregoing amended complaint by Hawkins, Capron, Reynolds and Corbin, three of the sureties on the bond given by Hawkins, filed their petition asking leave to be made parties plaintiffs to the action, which was granted.

They thereupon filed what they termed an amended supplemental complaint in their own names as plaintiffs, in which they repeated and set forth the substantial facts averred in

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the amended complaint of Hawkins as above set out, and proceeded to allege that since the institution of this suit the general creditors of Thomas Shakes had brought suit against Hawkins and his sureties on his bond for alleged breaches of his trust, the chief complaint being based upon his payment of the sum of nine hundred and forty-one dollars and fifteen cents, as above shown, to the defendant, Wheeler, which was at the trial adjudged to have been an illegal payment; that in said action the said general creditors recovered against Hawkins and his said sureties a judgment for one thousand four hundred dollars, mostly on account of such payment; that Hawkins was at the time insolvent, and that by reason of the premises they, the said Capron, Reynolds and Corbin, as such sureties, were compelled to pay, and did pay, on such judgment in equal proportions the sum of one thousand and ninety-six dollars; that in said action against Hawkins and his sureties it was adjudged that the said Capron, Reynolds and Corbin should become the owners of the money so held to have been illegally paid by Hawkins to the defendant to the extent that they might be required to pay the judgment therein rendered, and that they should be subrogated to the rights of Hawkins in such money. Wherefore they demanded that they should be subrogated to all the rights of both Hawkins and the general creditors of Thomas Shakes in the money in question, and that they might have all other proper relief.

The defendant moved to strike out this complaint of Capron, Reynolds and Corbin, upon the ground that it was inconsistent with and antagonistic to the complaint of Hawkins, and was in fact the commencement of a new suit against him. The court overruled this motion; and the defendant then filed a demurrer to said complaint upon the ground that there was a defect of parties plaintiffs, because Capron, Reynolds and Corbin were improperly joined with Hawkins as plaintiffs in the action, and that it did not con-

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tain facts sufficient to constitute a cause of action against him ; but his demurrer was also overruled.

Afterwards issues were formed upon the complaints, and the circuit court, after hearing the evidence, made a special finding of the facts which was in general accord with the allegations of the complaint of Capron, Reynolds and Corbin. As to the payments made by these last named persons on the judgment rendered against them for breach of his bond by Hawkins, the finding was that each had paid the sum of \$322, and that Alexander C. Thompson the other surety had paid nothing.

Upon the facts as thus found, the circuit court came to the conclusion: 1st. That the law was with the plaintiffs upon the issues formed between the parties. 2d. That the plaintiffs Capron, Reynolds and Corbin were entitled to recover from the defendant the sum of \$1,212.35. 3d. That the plaintiff Hawkins was entitled to recover of the defendant the sum of \$225.23. Judgment was rendered accordingly against the defendant.

Section 2674, R. S. 1881, is as follows: "Any part of the property assigned on which there are liens or encumbrances may be sold by the trustee subject to such liens or encumbrances, but in case the trustee should be satisfied that the general fund would be materially increased by the payment of such liens or encumbrances, he shall make application, by petition to the judge of the circuit court, for leave so to do, and abide the order in that behalf. Before the holder of any lien or encumbrance shall be entitled to receive any portion of his debt out of the general fund, he shall proceed to enforce the payment of his debt by sale, or otherwise, of the property on which such lien or encumbrance exists; and for the residue of such claim, such holder of such lien or encumbrance shall share *pro rata* with the other creditors, if entitled so to do by the laws of this State."

It is plain that under the provisions of this statute, Wheeler was not entitled to any of the money in the hands

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of Hawkins, as a general fund, until he had exhausted the mortgaged property.

The use by Hawkins of any part of this fund in payment of the debt secured by the mortgage was a waste of the estate for which he became liable at once to the general creditors. Burrill Assignments, 553.

In the absence of an agreement to repay the money it would be regarded as a voluntary payment, and could not be recovered back by Hawkins. *Egbert v. Rush*, 7 Ind. 706; *Connecticut M. L. Ins. Co. v. Stewart*, 95 Ind. 588.

It is contended by the appellant, that inasmuch as the payment was made by Hawkins to Wheeler in violation of law, therefore, it can not be recovered back. We are not inclined to adopt that view of the case. It may be conceded as a general proposition of law, that a contract prohibited by law is void. The general doctrine as to such contracts is, that the courts will not enforce them, nor aid in the recovery of money paid in pursuance of their terms, but parties who have contracted in violation of law will be left without remedy whenever they are *in pari delicto*, but we do not think this case falls within the rule. While it is true that Wheeler was not entitled to this money until after the mortgaged property was exhausted, still the mortgaged property when exhausted might not have paid his debt in full, in which event he would have been entitled to share *pro rata* as to the unpaid balance with the general creditors. There is nothing in the statute expressly prohibiting the contract, and Hawkins seems to have been acting in good faith for what he believed to be the best interest of the estate represented by him. It is not every contract which is forbidden by law that is void. There are some exceptions to the general rule. See *Deming v. State, ex rel.*, 23 Ind. 416; *New England Fire, etc., Ins. Co. v. Robinson*, 25 Ind. 536.

If Hawkins had loaned this money to Wheeler it would have been an unlawful use of the funds, yet it can not be

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successfully contended that he could resist the payment of a note given for its repayment upon that ground.

We do not think the contract to repay the money upon the contingency set forth in the complaint is void as being in violation of law.

When this case was here on a former appeal it was held that the complaint did not show a sufficient consideration for the agreement therein set out.

The amended complaint is essentially different from the one then appearing in the record, and we think it now shows a sufficient consideration for the agreement entered into between Hawkins and Wheeler.

We do not think the court erred in overruling the demurrer of Wheeler to the amended complaint.

The petition upon which Capron, Reynolds and Corbin were admitted as co-plaintiffs in the action is not in the record, and by reason of that fact we have no authentic information as to the grounds upon which they were so admitted. But it can not be said that their complaint was inconsistent with, or antagonistic to, the complaint of Hawkins. It was intended to accomplish the same object which Hawkins was seeking to accomplish, namely, the recovery of the trust funds in the hands of Wheeler. It is true that they might have brought an independent suit for that purpose, but the law abhors a multiplicity of suits, and to avoid that calamity the court doubtless thought it best to admit them to join with Hawkins, to the end that one trial might determine the whole controversy. By the payment of the judgment recovered on the bond of Hawkins by the sureties, Capron, Reynolds and Corbin, they became subrogated to the rights of both the general creditors, who recovered the judgment, and of Hawkins, to the amount they were compelled to pay. As the amount paid by them was less than the whole sum in the hands of Wheeler, it follows that the trust fund in Wheeler's hands belonged to them and Hawkins. In support of the doctrine that they were entitled to recover, see 2 Perry Trusts,

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section 828, *McComas v. Long*, 85 Ind. 549, *Boyer v. Libey*, 88 Ind. 235, *Sheldon Subrogation*, section 89, and *Brandt Suretyship*, section 260.

The objection is further made that, in any event, the matters alleged by Capron, Reynolds and Corbin did not show a joint claim in their favor against Wheeler, and that for that reason, if for no other, the demurrer to their complaint ought to have been sustained.

The general rule is that where a surety pays the debt of his principal he acquires only a several claim against the latter for reimbursement, or against each one of his solvent co-sureties for contribution, but there are cases in which co-sureties may unite in an equitable suit either for reimbursement or contribution. *Brandt Suretyship*, section 255.

Several creditors may often unite in the enforcement of a common but not joint interest. They may unite in a suit to enforce separate liens on the same property or separate claims against the same common fund. Several creditors of the same insolvent debtor may also unite in a suit to set aside a fraudulent conveyance of real estate, and to subject the same to sale for the payment of their several debts. It was, therefore, upon the same general principle, competent for Capron and his co-sureties to join in the enforcement of their separate claims against the common fund in the hands of Wheeler, to which they had become subrogated. Upon the same principle it was proper to permit Hawkins to join with them also, as he likewise had an interest in that fund.

The proceedings in this case are somewhat out of the usual order in practice, but we do not think that any substantial error was committed by the court below in permitting Hawkins and his sureties to join in a common cause to recover from the defendant a fund in which they were all interested.

A joint judgment in favor of Capron, Reynolds and Corbin was proper. *Home Ins. Co. v. Gilman*, 112 Ind. 7. At least it is not a matter of which the appellant can be heard to complain.

Deford v. Deford.

As found by the court he owes the aggregate amount for which the judgment was rendered, and it must be immaterial to him whether he pays it to them jointly or severally. The division of the fund is a matter that concerns them, and is of no interest to him.

We find no error in the record for which the judgment should be reversed.

The judgment is affirmed, with costs.

Filed Jan. 12, 1889.

No. 13,462.

DEFORD v. DEFORD.

116	523
145	073

ARBITRATION AND AWARD.—*Objection.*—*Evidence.*—Objections to an award must be on the statutory grounds, and then the court may hear evidence pertinent thereto, but where there is conflicting evidence the conclusion reached will not be disturbed on appeal.

SAME.—*Power of Court to Correct.*—The extent of the power of the court under section 846, R. S. 1881, is to correct a miscalculation of figures that is evident upon the face of the award, considered in connection with the submission and the admissions of the parties made therein or in connection therewith, or to correct such other obvious mistakes in reference to the description of any person or thing referred to, or in respect to the matters submitted, or the form of the award, as appear upon the face of the papers.

From the Marion Superior Court.

J. B. Black, W. V. Rooker and O. S. Hadley, for appellant.

W. W. Woollen, for appellee.

MITCHELL, J.—In April, 1871, John A. Deford, claiming to be the owner of a stationary steam saw-mill, instituted a

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suit in replevin in the Marion Superior Court against one Urban. He obtained possession of the property by executing a replevin bond, with George W. Deford as surety. The saw-mill was turned over to the latter, as indemnity against loss on account of his having signed the bond as above mentioned. After much litigation, judgment was finally rendered in favor of Urban, awarding him the return of the mill, and assessing his damages at \$600. Pending the litigation, George W. Deford, who had possession of the property in dispute as above stated, sold it, without the knowledge or consent of John A. Deford, taking in payment of the purchase-price secured notes amounting to \$1,000. These notes were afterwards turned over to, and collected by, John A. Deford. George W., who had used the mill for some time before he sold it, also paid off the \$600 judgment recovered by Urban against John A., besides paying some other expenses growing out of the litigation. Subsequently a dispute arose between the Defords as to the state of the account between them growing out of the above mentioned transactions. The matters in dispute were submitted, in writing, to arbitration, with an agreement that the award when duly rendered should be made a rule of the Marion Superior Court, and judgment entered thereon accordingly.

On the 19th day of June, 1885, two of the three arbitrators submitted their award, in writing, in which they returned that George W. Deford was indebted to John A. in the sum of \$800, which sum they awarded the latter, with interest from date, to be paid within sixty days from date.

George W. Deford afterwards appeared in court and moved to vacate and set aside the award, alleging for cause against the rendition of judgment thereon, that the arbitrators refused to hear material evidence offered by the objector, that they were guilty of misconduct in refusing to be governed by the evidence, and in deciding contrary to the weight of the evidence, and that the arbitrators exceeded their power and

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authority in various specified ways. Affidavits and counter-affidavits were filed and duly considered by the court.

After being fully advised, the court overruled the motion to vacate and set aside the award.

The grounds upon which the rendition of a judgment upon an award may be resisted are specifically set out in section 845, R. S. 1881.

These are, in effect, that the award was obtained by fraud, corruption, partiality or other undue means; that the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause, or in refusing to hear evidence pertinent to the controversy, or misbehaving in any other way to the prejudice of the party complaining, or that they exceeded, or so imperfectly executed their powers as that a final award was not made.

Some of the objections specified in the motion are not within the statutory grounds, and were, therefore, not proper subjects for consideration. An award which is good upon its face can not be impeached except for causes enumerated in the statute. It is not competent for the court to inquire by extrinsic evidence into the merits of the case or the justice of the award, or whether or not the arbitrators decided according to the weight of the evidence, or observed the technical rules of law, strictly, in hearing, or refusing to hear, evidence.

This would be, in effect, to try the matters in controversy over again. The court may, however, hear evidence pertinent to the statutory grounds of objection, which may have been specifically and particularly charged in the motion. These are to be disposed of summarily without the aid of a jury, but the court will not consider whether the award was wise or unwise. *Bumpass v. Webb*, 29 Am. Dec. 274.

As we have seen, there were affidavits and counter-affidavits in support of and against the several grounds alleged for setting aside the award. The court having, upon consideration of the evidence, reached a conclusion adverse to the

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motion, since there was conflicting evidence, the conclusion so reached will not be disturbed on appeal. The rule applicable when misconduct of jurors is alleged controls in a case like the present. *Dill v. Lawrence*, 109 Ind. 564, and cases cited.

The appellant also moved the court to modify and correct the award, because of an alleged evident miscalculation of figures, and because the award was imperfect in form. Affidavits and counter-affidavits in support of and against the motion were filed, and upon due consideration this last motion was also overruled.

The power of the court to modify or correct an award for an obvious or evident miscalculation of figures, or when the arbitrators have awarded upon some matter not included in the submission, or when the award is imperfect in form, is expressly given by statute. Section 846, R. S. 1881.

In the consideration of a motion to modify or correct the court will be limited to what appears upon the face of the submission and the award. The extent of the power of the court under the latter section is to correct a miscalculation of figures that is evident upon the face of the award, considered in connection with the submission, and the admissions of the parties made therein or in connection therewith, or to correct such other obvious mistakes in reference to the description of any person or thing referred to, or in respect to the matters submitted, or the form of the award, as appear upon the face of the papers.

There is no miscalculation of figures evident on the face of the award, nor is there any imperfection in the form of the award specified in the motion. A general averment is not sufficient. The appellant can not complain that sixty days' time was given him to make payment of the amount awarded against him. There was hence no error in overruling the motion to modify.

The judgment is affirmed, with costs.

ELLIOTT, C. J., took no part in the consideration of this cause.
Filed Jan. 12, 1889.

The State v. Sutton.

No. 14,328.

THE STATE v. SUTTON.

116	527
123	210
116	527
124	223
125	206

CRIMINAL LAW.—Kidnapping.—Indictment.—An indictment for kidnapping, which charges an offence in the words of the statute or in words of equivalent meaning, is sufficient.

SAME—Statute Construed.—The offence of kidnapping as defined by one branch of the statute, section 1915, R. S. 1881, is complete if the person is feloniously carried away from his residence, unless the act is done pursuant to some State or Federal law, and an arrest or an imprisonment not made pursuant to such laws constitutes the offence under the other branches of the statute if either is made with the felonious intention of carrying the person from his residence.

From the Dubois Circuit Court.

J. L. Bretz, Prosecuting Attorney, for the State.

J. E. McCullough and *T. H. Dillon*, for appellee.

ELLIOTT, C. J.—The indictment professes to charge the appellee with the offence of kidnapping, as defined in section 1915, of the criminal code.

The first count thus charges the offence: “That Auzley Sutton, on the 5th day of April, 1886, at the county and State aforesaid, did then and there feloniously, forcibly and fraudulently carry away from his place of residence and imprison Joel R. King forcibly and against his will; that said forcible and fraudulent arrest of him, the said Joel R. King, was not then and there in pursuance of any law of the State of Indiana, nor in pursuance to any law of the United States.”

If this count of the indictment does, as the State contends, employ the words of the statute, or equivalent words, it is good. It has long been the rule in this State, as well as elsewhere, that an indictment which charges an offence in the words of the statute, or in words of equivalent meaning, is sufficient. *State v. Smith*, 74 Ind. 557, and cases cited p. 558; *Gillett Crim. Law*, 132*a*, and authorities cited in note.

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This rule applies to the crime of kidnapping. Mr. Bishop says: "In practice, most of our indictments for this offence are on statutes; in which case, the pleader's special concern will be to follow the statutory terms." 2 Bishop Crim. Procedure, section 692.

In *State v. McRoberts*, 4 Blackf. 178, the rule was applied to a case of kidnapping, the court saying: "This description of the offence agrees with the language of the statute, and is therefore sufficient."

The count under immediate mention is, in some respects, stronger than the statute, for it charges that the carrying away was felonious. The word "felonious" is one of great power. *Carder v. State*, 17 Ind. 307; *Weinzorpfli v. State*, 7 Blackf. 186.

Taken in connection with the other words of the indictment, it charges that the act of the appellee was a criminal wrong, and excludes any presumption or inference of its lawfulness. If this count of the indictment does charge that the defendant feloniously and unlawfully carried Joel R. King from his residence, and that he did not carry him from it pursuant to any law of the State or Nation, it must be held to sufficiently show that it was done without legal excuse or justification.

The statute does not make it an element of the offence that the person seized shall be carried out of the State, or out of the county. If he is unlawfully and feloniously carried away from his residence, the offence is complete. *State v. Rollins*, 8 N. H. 550.

It is said by appellee's counsel that two offences are defined by the statute: "1st. Whoever forcibly or fraudulently carries off or decoys any person from his place of residence, unless it be in pursuance of the laws of this State or of the United States, is guilty of kidnapping. 2d. Whoever arrests or imprisons any person with the intention of having such person carried away from his place of residence, unless it be

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in pursuance of the laws of this State or of the United States, is guilty of kidnapping."

We think that counsel have admirably stated the true construction of the statute, so far as they have gone, but we are inclined to think they have not gone far enough. We are also inclined to agree in their suggestion, that "We suspect that the question of whether the arrest was lawful or unlawful signifies but little;" but we can not entirely concur in their ultimate conclusion. Our judgment is that the offence, as defined by one branch of the statute, is complete if the person is feloniously carried away from his residence, unless the act is done pursuant to some State or Federal law, and that an arrest or an imprisonment not made pursuant to such laws constitutes the offence under the other branches of the statute, if either is made with the intention of carrying the person from his residence.

The clause which reads, "and said false and fraudulent arrest of him, the said Joel R. King," must be construed with its associated words and clauses; but, when thus construed, it does not refer to the carrying away, but to the arrest, for it is antecedently charged that there were two acts, an arrest and a carrying away, so that the clause must be held to refer to the act it expressly designates, that is, the arrest. To make the first count sufficient to charge the offence, other words must be added, for it must be shown that the arrest was unlawfully made for the purpose of carrying away the person arrested from his residence. It must, in other words, be made to appear that the arrest was made with the intention "of having such person carried away from his residence," for so the statute provides. A defendant may make a fraudulent, felonious and forcible arrest, and yet not be guilty of kidnapping, and all that this count of the indictment properly charges on this immediate point is, that there was a fraudulent and felonious arrest not made pursuant to any State or Federal statute. It is therefore bad, for it does not charge

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an unlawful arrest with the specified unlawful intention, nor does it charge that the carrying away was not pursuant to any statute of the State or of the United States.

The charging part of the second count reads thus : " That Auzley Sutton, on the 5th day of April, 1886, at Dubois county, in the State of Indiana, did then and there feloniously, forcibly and fraudulently arrest Joel R. King, with the felonious and fraudulent intention of carrying him, the said Joel R. King, forcibly and against his will, from his place of residence, said forcible and fraudulent arrest not being then and there made in pursuance of any law of this State or of the United States."

Much that we have said in discussing the first count applies to the second, and if our previous conclusions are correct, the latter count is good, for it adds the words lacking in the first, as it charges that the felonious and fraudulent arrest was made with the felonious and fraudulent intention of carrying King from his residence. The construction placed upon the statute by appellee's counsel is, as we have said, correct as far as it goes, but it does not go far enough, inasmuch as it omits the statement which the use of the word "or" between the words "arrest" and "imprison" makes necessary. The word "or" makes it necessary to add that one who feloniously arrests or who feloniously imprisons another, with the "intention of carrying him away from his residence," is guilty of kidnapping. If a defendant arrests, or if he imprisons another, with the felonious intention designated, he is guilty, for it is not necessary that he should both arrest and imprison, since, if he does either of these acts with the felonious intention of carrying away, the offence is complete. As it is here charged that the act and the intention concurred, the second count is good, and the court erred in sustaining the motion to quash.

Judgment reversed, with instructions to overrule the motion to quash the second count of the indictment.

Filed Jan. 12, 1889.

Otis v. De Boer.

No. 12,895.

OTIS v. DE BOER.

DRAINAGE.—Parties.—Action in Rem.—In all cases having the essential qualities of actions *in rem*, as a drainage proceeding, it is sufficient, in making any one a party defendant, to allege that he has, or claims to have, some interest in the property described in the complaint.

SAME.—Act of 1879.—Notice of Assessments.—Collateral Attack.—In an action to collect assessments on lands for the construction of a ditch under the drainage law of 1879, where the notices of the assessments had been held sufficient by the proper county board, their decision is conclusive as against a collateral attack.

From the Jasper Circuit Court.

S. P. Thompson, for appellant.

E. P. Hammond and *F. W. Babcock*, for appellee.

NIBLACK, J.—On the 8th day of September, 1880, Binnie De Boer, the appellee in this proceeding, presented a petition in writing to the board of commissioners of the county of Jasper, representing that he was the owner in fee simple of a particularly described tract of land, in a certain township of that county, which was wet, marshy and overflowed land, and which, for its drainage, required the widening, deepening and cleaning out of a ditch then already constructed through a part of such land, and the construction of an additional open drain, both extending a distance of six thousand and five hundred feet on a particularly specified route; also representing that the proposed work could not be constructed without affecting the lands of other persons situate in the same township and county, giving a list of such lands and the owners thereof respectively, in which Jasper Corning was named as the owner of four of the tracts of land contained in such list. The petition further represented that the proposed work, when constructed, would be conducive to health, and would be a work of public utility, and prayed the

116	531
120	523
121	392
116	531
124	472
125	463
116	531
130	518
116	531
128	85
116	531
140	254
142	343
116	531
152	578

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appointment of appraisers to make assessments against the lands; which would thereby be benefited, under the provisions of the act of March 13, 1879, Acts 1879, 234. Ten days before the time at which the petition was presented, De Boer gave notice of its presentation by posting up written notices in three of the most public places of the township in which the lands were situate, describing the lands to be affected, and giving the names of the owners thereof as they appeared in the petition. The board of commissioners, after hearing proof of the matters alleged in the petition, and of the posting up of notices as stated, made an order appointing three disinterested freeholders of the county as appraisers to make assessments against the lands to be affected and benefited by the contemplated drainage.

A copy of this order and appointment was very soon delivered to the appraisers by De Boer, and a part of the land-owners being non-residents of the county, as well as of the State, he caused notice to them that said appraisers would meet at the place of beginning of the work in hand on the 6th day of October, 1880, to be published in due time in a weekly newspaper of general circulation published in said county of Jasper. The appraisers met at the time and place named, and coming to the conclusion that the resident land-owners had not been sufficiently notified of the meeting, they adjourned to meet at the same place on the 27th day of October, 1880, notice of which latter meeting was properly served on such resident land-owners. On this last named day the appraisers met and proceeded to examine the lands to be affected, and to make assessments for benefits and costs of the proceedings against each and every tract thereof. They made assessments against the several tracts of land described in the petition as belonging to Jasper Corning, as follows: Against the first described, the sum of \$93.08; against the second, the sum of \$26.75; against the third, the sum of \$173.14; against the fourth, the sum of \$129.20. The appraisers thereupon made a report, under oath, of the assess-

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ments so made by them, and upon such other matters as they were required to examine, and concerning which they were to make a report, a copy of which report was duly recorded in the proper recorder's office.

De Boer then caused the ditch to be completed according to the specifications, prior to the 12th day of December, 1884, and on that day the surveyor in charge of the work executed a written certificate stating the fact of such completion, which was, on the day following, filed with the auditor of Jasper county. De Boer also paid all expenses of the proceedings upon his petition, as well as the cost of constructing the ditch.

In the proceedings which led to the assessments against the lands described in the report of the appraisers, Jasper Corning was treated as a non-resident of the State of Indiana, and was, as such, only constructively notified by publication in a newspaper as stated.

The assessments made against the lands alleged to have been owned by Jasper Corning not having been paid, De Boer commenced this suit against Joseph E. Otis and the unknown heirs and devisees of Jasper Corning, deceased, and the unknown heirs and devisees of the unknown heirs and devisees of the said Jasper Corning, to enforce the supposed liens created by such assessments, averring the facts herein above stated, and alleging that, at the time of the presentation of his petition to the board of commissioners of Jasper county, and for more than two years thereafter, the lands in question were shown by the real estate transfer book in the office of the auditor of said county of Jasper to be the property of Jasper Corning, and that, for that reason, as well as because the same also so appeared on the proper tax lists and duplicates, such lands were represented in the petition, and in the list of assessments, as belonging to the said Jasper Corning.

In referring to the lands to be affected by the proposed ditch, the petition preliminarily stated that "The following

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is a list of lands with the names of the owners thereof so far as can be ascertained by your petitioner."

The complaint further alleged that more than two years after the assessments against the lands were made, the plaintiff, De Boer, ascertained that Jasper Corning had died prior to the year 1880, seized in fee simple of the lands so assessed; that he, the plaintiff, did not know, and was, therefore, not able to state, who were the heirs or devisees of the said Jasper Corning, or to whom such lands might have been devised or had descended; that said Joseph E. Otis pretended to have some title to or interest in the land, but that whatever title or interest he might have was subordinate to the assessment liens against the lands, and that the defendants were, and had ever been, non-residents of the State of Indiana.

Otis demurred to the complaint upon the ground that, upon the facts stated, no lien attached to the lands assessed in the name of Jasper Corning, and that hence no cause of action was shown either against him or such lands, but his demurrer was overruled, and he answered in two paragraphs, the first of which was in general denial, and the second contained special matters in defence. He afterwards filed what was in form a third paragraph of answer, but which was pleaded as a counter-claim in his behalf. This second or special paragraph of answer, and the third paragraph or counter-claim, were both held to be sufficient upon demurrer; whereupon the plaintiff replied in four paragraphs. The first of these paragraphs was in denial only, and the rest replied special matters in avoidance.

The defendant Otis demurred to the second, third and fourth paragraphs of the reply, and his demurrer was sustained as to the second, and overruled as to the third and fourth.

During the progress of the cause the suit was either actually, or in legal effect, dismissed as to all the defendants other than Otis, and at the hearing the circuit court came to

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the conclusion that there was due to the plaintiff in the premises the aggregate sum of three hundred and eighty-two dollars and ninety-five cents (\$382.95), and that the several amounts respectively assessed against each of the tracts of land, described as belonging to Jasper Corning, were liens upon such tracts.

After overruling a motion for a new trial, and also a motion in arrest of judgment, the circuit court rendered judgment for the amount so ascertained to be due, and entered a several decree against the lands for the payment of the judgment.

The first objection to the complaint, made in its natural order, is, that it did not specifically state the nature or character of the title of the appellant, Otis, to the lands in controversy, and therefore failed to show that he had any real interest in the subject-matter of the action.

In all suits of the class to which this belongs, it is sufficient, in making any one a party defendant, to allege that he has, or claims to have, some interest in the property described in the complaint. This is the rule, also, in analogous cases, notably in actions to quiet title to real estate and other cases having the essential qualities of actions *in rem*. *Marot v. Germania, etc., Ass'n*, 54 Ind. 37; *Jeffersonville, etc., R. R. Co. v. Oylor*, 60 Ind. 383; *Stumph v. Reger*, 92 Ind. 286; *Woodworth v. Zimmerman*, 92 Ind. 349; *Carver v. Carver*, 97 Ind. 497; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581.

It devolves upon a person thus made a defendant to assert whatever title he may have, or claim to have, if he shall desire to make a defence, or to rely upon his title.

The next objection made to the complaint is that it showed upon its face that no notice whatever was given of the drainage proceedings to the real owners of the lands against which the alleged liens were sought to be enforced, and that, consequently, it was made to appear affirmatively that such proceedings were void as against such real owners and those claiming under them.

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The drainage proceedings, set out in, and relied upon by, the complaint, constituted an action *in rem* purely and simply, having been taken under the act of March 13th, 1879, already referred to, and belonging to that class of proceedings in which constructive notice only of the filing of the petition was required, and in which notice to non-residents of the county, and unknown defendants, by publication at a subsequent stage of the action, was directed to be made. A judgment *in rem* is, in its effect, wholly distinct from that of a judgment against a defendant *in personam*. Such a judgment may be entirely conclusive as to the property involved, and yet be ineffectual for any purpose against the defendant personally. 4 Wait Actions and Defences, 188, *et seq.*

In proceedings *in rem* proof of actual notice as against non-resident, or unknown, defendants, is seldom, if ever, required, and in a collateral attack upon a judgment *in rem* a liberal interpretation will be given to the rules governing constructive notice when necessary to sustain the judgment. It is not essential to the validity of an assessment under the act of 1879, that notice should have been first given to the actual owners of the lands assessed.

Under that act the petition was required to give the names of such owners only when such names were known to the petitioner, and when notice was given of the time and place of making an assessment, it was sufficient to state the names of persons whose lands were to be thereby affected only so far as the same were known to the applicant, or as such names were shown by the real estate transfer book in the office of the auditor of the proper county. But, waiving all other questions as to the sufficiency of the notices in the case before us, it need only be noted that these notices were, at least impliedly, held to have been sufficient by the board of commissioners of Jasper county in acting first upon the petition and afterwards upon the assessments. That tribunal having had jurisdiction to decide upon the sufficiency of such notices, the conclusions reached by it are impervious to col-

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lateral attack. *Faris v. Reynolds*, 70 Ind. 359; *Miller v. Porter*, 71 Ind. 521; *Mulikin v. City of Bloomington*, 72 Ind. 161; *Hume v. Little F. R. Drain. Ass'n*, 72 Ind. 499; *Porter v. Stout*, 73 Ind. 3; *Brokaw v. Board, etc.*, 73 Ind. 543; *Muncey v. Joest*, 74 Ind. 409; *Stoddard v. Johnson*, 75 Ind. 20; *Marshall v. Gill*, 77 Ind. 402; *Hume v. Conduitt*, 76 Ind. 598; *Ricketts v. Spraker*, 77 Ind. 371; *Argo v. Barthand*, 80 Ind. 63; *Town of Cicero v. Williamson*, 91 Ind. 541; *Cauldwell v. Curry*, 93 Ind. 363; *Dowell v. Lahr*, 97 Ind. 146; *Smith v. Clifford*, 99 Ind. 113.

Consequently, the conclusion reached by us is, that the complaint under consideration was sufficient upon demurrer. This conclusion receives either a direct or a general and implied support from the recent cases of *Prezinger v. Harness*, 114 Ind. 491, and *Montgomery v. Wasem*, ante, p. 343, and the authorities cited by those cases.

So far as the same have been brought to our attention, none of the proceedings subsequent to the overruling of the demurrer to the complaint were in violation of the general principles herein above announced. It follows that no available error was committed by the circuit court during such subsequent proceedings, either in its rulings upon the pleadings, or in its denial of the motion for a new trial.

The judgment is affirmed, with costs.

Filed Jan. 5, 1889; petition for a rehearing overruled March 12, 1889.

Wright v. Dick et al.

116	538
122	167
116	538
130	543
116	538
136	242

No. 13,513.

WRIGHT v. DICK ET AL.

SHERIFF'S SALE.—*Action to Set Aside.*—*Inadequacy of Price.*—Gross inadequacy of price, coupled with slight additional facts showing fraud irregularity, or any other circumstance which may have operated to prevent the property from bringing its fair value, will avoid a sheriff's sale.

SAME.—*Good-Faith Purchaser.*—*Irregularities.*—*Redemption.*—*Limitation of Action.*—*Waiver.*—Mere irregularities, such as the failure to levy upon and exhaust the debtor's personal property before resorting to his real estate, or the sale of his real estate in a body when it is susceptible of division and sale in parcels, will not necessarily render a sale void as against a good-faith purchaser. Such irregularities, as a general rule, can only be taken advantage of by an execution defendant, and will be deemed waived if acquiesced in by him during the statutory period of redemption.

SAME.—*Omission to Demand Sheriff's Deed.*—The mere omission of a purchaser to demand a deed from the sheriff at the expiration of the period for redemption, will not ordinarily defeat his absolute and continuous right to a conveyance after that time, where the sale has been properly made, the writ duly returned and a proper record thereof made.

SAME.—*Duty of Sheriff to Sell Personally.*—*Presumption.*—*Burden of Issue.*—Where, instead of selling personal property as required by section 730, R. S. 1881, a tract of real estate worth \$1,800 was levied on and sold to satisfy a balance of \$20 due on a judgment, such sale is presumptively void because of unfairness and oppression, and the law imposes on the purchaser the burden of showing that he took no advantage of the want of actual notice to the owner of the sale, and that there was no concealment, mistake or misapprehension which induced the owner to omit to redeem within the statutory period.

SAME.—*Equity.*—*Subsequent Mortgagees and Purchasers.*—In such case, subsequent mortgagees and purchasers of land so sold are equitably entitled to have their lien and rights enforced after the statutory period of redemption, the law presuming that they were misled by the sheriff's failure to perform his statutory duty.

From the Huntington Circuit Court.

L. M. Ninde, T. G. Smith and B. F. Ibach, for appellant.
W. H. Trammell, for appellees.

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MITCHELL, J.—The plaintiffs, Dick and Taylor, claiming to be the joint owners of an undivided two-thirds of a particularly described eighty-acre tract of land in Huntington county, and alleging that the defendant, Marshall Wright, was the owner and in possession of the other undivided one-third of the same tract, commenced suit for partition, and to correct an alleged clerical mistake in their deed. The defendant presented various defences by way of answer to the complaint, and he also filed a cross-complaint, in which he claimed title to the entire tract of land. After setting out the facts in detail upon which he predicated his right to the land, and those which he claimed rendered the plaintiffs' title invalid, the defendant, in his cross-complaint, asked as relief, that the deed under which the plaintiffs asserted title might be declared null and void, and that the title to the land might be quieted in him. Issue having been duly joined, the court, after hearing the evidence, found the facts specially, and stated conclusions of law thereon. Waiving intermediate questions, the merits of the case may be disposed of by considering the special finding of facts and the propriety of the conclusions of law stated by the court.

The facts found show that on the 21st day of March, 1876, John Morgan, for and on behalf of Dick and Taylor, recovered a judgment in his own name, in the Huntington Circuit Court, against William and Joseph Ruggles, for \$115.50, besides costs. This judgment authorized the sale of property without appraisement, and became a lien on the land described in the complaint, which was owned by Joseph Ruggles. On the day following the entry of judgment an execution was issued, and in the month of June, 1876, the sheriff received, as part payment on the execution, \$120, of which sum \$103 was applied on the judgment, \$13.20 on the original costs and \$3.80 on the sheriff's fees on the execution. This writ was returned on the 18th day of October, 1876, unsatisfied. On the same day a second execution was issued, which was returned by order of the plaintiff on the 18th day of

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April following, without any attempt having been made to collect the amount due, and with \$3.70 additional costs taxed thereon.

On the 19th day of April a third execution was placed in the sheriff's hands commanding him to collect \$13.20, balance of judgment, \$1.34 interest, and \$5.74 accrued costs. On the 28th day of June, the sheriff, without—so far as appears by his return, which is set out in the special finding—serving the execution on the judgment debtors, or either of them, or without, so far as appears, making any demand of them for property, levied on the lands in controversy as the property of Joseph Ruggles, and, after one advertisement, sold the whole tract to the judgment plaintiff for \$36.44, that being the amount claimed as the balance due on the judgment with the accumulated costs. The execution was duly returned with the doings of the sheriff thereon endorsed, and the return was properly recorded by the clerk in the proper record.

It is found that Joseph and William Ruggles both lived in Huntington county at the time of the levy and sale, above mentioned, and that they had personal property of the value of \$1,000, subject to execution. It is also found that the eighty-acre tract of land which, with the improvements placed thereon, was at the time of the trial worth \$2,500, was sold *in solido*, when it might have been sold in parcels if it had been so offered. The sheriff issued a certificate of purchase to Morgan in 1877; at the time the land was sold. The latter assigned the certificate to his principals, Dick and Taylor, who, on the 21st day of May, 1883, presented it to the sheriff and obtained from him a deed, under which they claim the undivided two-thirds of the land, that being all the interest which a purchaser at an execution sale could acquire under the law, the debtor being a married man.

The defendant, Wright, claims title from the following source: On the 25th day of April, 1876, about one month after the Morgan judgment became a lien, Joseph Ruggles

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and wife executed a mortgage on the land in dispute, as security for a debt due to Marshall & Dill. This mortgage was afterward, in October, 1877, foreclosed and the property sold in pursuance of the decree of foreclosure for \$1,536.63. The purchaser obtained a sheriff's deed in due course. Morgan, who had recovered the judgment above mentioned, and upon which, as has been seen, a small amount remained unpaid at the time the proceedings to foreclose the subsequent mortgage were instituted, was not made a party. Wright, subsequently, in 1881, purchased the land and took a conveyance from the purchaser under the foreclosure sale. The deeds were properly recorded. The defendant purchased in good faith, for full value, went into possession, paid the taxes, and made lasting improvements worth \$700, without any actual notice of the plaintiffs' claim, or of the sale on the execution. In March, 1883, before the institution of the suit, the defendant, having become aware of the previous judgment and sale, tendered the plaintiffs the full amount of their purchase-money, with eight per cent. interest from the date of sale, which tender has been kept good, but which the plaintiffs refuse to receive.

Upon the facts found the court stated conclusions of law to the effect that the plaintiffs were the owners in fee simple of the undivided two-thirds of the tract in dispute, and that the defendant owned the undivided one-third, and that there ought to be partition accordingly.

The conclusions of the court proceed upon the theory that the inadequacy of the price paid did not make the sale void; that although the levying upon and sale of the whole tract of land, when it might have been sold in parcels, was such an irregularity as might have subjected the sale to avoidance, in a direct proceeding seasonably instituted for that purpose, yet it did not render the sale void, and the purchaser's right to a sheriff's deed was not affected by his failure to demand a deed for nearly six years after the sale, since the entries of the clerk, showing the return of the execution

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with the doings of the sheriff thereon, constituted a record, of which the cross-complainant and his grantors were bound to take notice.

If it were conceded that the several conclusions of law stated by the learned court are unassailable and correct in the abstract, it would not follow that an execution sale should be upheld because each one of a number of defects might be successfully overcome in the absence of the others. For example, it is quite well settled that inadequacy of price alone will not justify the setting aside of a sheriff's sale, which is in other respects unexceptionable and made to a *bona fide* purchaser, unless the disparity between the value of the property sold and the price paid is so enormous as to shock a correct mind.

But the authorities universally agree that gross inadequacy of price, coupled with slight additional facts, showing fraud, irregularity, or any other circumstance, which may have operated to prevent the property from bringing something like its fair value, will avoid a sale. *Fletcher v. McGill*, 110 Ind. 395, and cases cited; *Rorer Judicial Sales*, sections 1086, 1087, 1095; *Freeman Ex.*, section 309.

The law furnishes a creditor with compulsory process to enable him to coerce the collection of his debt, and it prescribes certain methods which are to be pursued in making the collection. A merely irregular use of the process, such as the failure to levy upon and exhaust the debtor's personal property before resorting to his real estate, or the sale of his real estate in a body, when it should have been subdivided and sold in parcels, does not necessarily render the sale void as against a good-faith purchaser. *Nelson v. Bronnenburg*, 81 Ind. 193.

Such irregularities, as a general rule, can only be taken advantage of by the execution defendant. *Ayres v. Duprey*, 27 Texas, 593 (86 Am. Dec. 657). These may be waived by the debtor, and will be deemed waived if he acquiesces during

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the statutory period of redemption. *Lynch v. Reese*, 97 Ind. 360; *Johnson v. Murray*, 112 Ind. 154.

So the mere omission of the purchaser to demand a deed from the sheriff at the expiration of the period for redemption, will not, ordinarily, defeat his absolute and continuous right to a conveyance after that time, where the sale has been properly made and the writ duly returned, and a proper record thereof made. *Maddux v. Watkins*, 88 Ind. 74; *Ringle v. First Nat'l Bank*, 107 Ind. 425.

While the process of the court may be employed to coerce the payment of a debt, it can not be resorted to for any other purpose, and while the mere irregular use of an execution may not of itself render the sale of property void, yet where the price is so enormously out of proportion to the value of the property as to suggest that the creditor may have had some ulterior purpose in view, courts are on the alert to discover irregularities in the method of making the sale, and in seizing upon slight irregularities as the ground upon which to declare the sale constructively fraudulent. *Carden v. Lane*, 48 Ark. 216 (3 Am. St. R. 228).

If property has been sold at a price at which no man with an honest, correct mind would accept another's property, or for which no sane man owning the property would sell it, even under compulsion, if there were irregularities in the sale, or circumstances indicating fraud or unfairness, the law will ascribe to these irregularities and attending circumstances the effect of bringing about the ruinous sacrifice of the property. *Chamblee v. Tarbox*, 27 Texas, 139 (84 Am. Dec. 614).

If the purpose of the creditor in the present case was to collect his debt and nothing more, it is difficult to perceive why one execution after another should have been issued, accumulating costs and occasioning delay, when the debtors had personal property available and subject to execution; nor is it less difficult to perceive the necessity for levying upon an eighty-acre tract of real estate, and incurring the expense, and submitting to the delay, of advertising the sale in

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a newspaper, when personal property could have been seized and sold with half the expense and in half the time. Besides, the course which a creditor, desiring nothing more than to make his money in the cheapest and most expeditious manner would naturally have taken, was precisely the course which the law made it his duty to pursue. The statute then, like the one now in force, exempted the debtor's real estate from levy and sale unless his personal property subject to execution was insufficient, or unless the debtor himself directed the levy and sale to be made otherwise. Section 730, R. S. 1881 ; section 444, 2 R. S. 1876, p. 210.

Instead of pursuing the method prescribed by the statute and levying his execution upon personal property of the defendants, sufficient in amount to satisfy the small balance remaining unpaid on the judgment, an eighty-acre tract of land, worth not less than \$1,800, was levied upon and sold to satisfy a debt, which, stripped of the amount of costs illegally made, was less than twenty dollars. The execution when placed in the hands of the officer became a lien on the personal property of the debtors. The subsequent mortgagees and purchasers of the real estate were equitably entitled to have their lien enforced, and in view of the statute making personal property primarily liable to the satisfaction of the writ, they had a right to presume that it would be enforced as the law directed. It may well be presumed that they were misled by relying upon a due execution of duty by the sheriff, and the judgment creditor, who in this instance was the purchaser.

A sale, such as the one under consideration, being of an amount of property so grossly excessive as to raise a presumption of unfairness and oppression, is presumptively fraudulent, and the law imposes upon the purchaser the burden of showing that he took no advantage of the want of actual notice of the owner, that his property had been sold, and that there was no concealment, nor mistake or misapprehension on the part of the owner, which induced him to

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omit to redeem within the statutory period. *Graffam v. Burgess*, 117 U. S. 180; *Butler v. Haskell*, 4 Des. 651; *Cook v. Jenkins*, 30 Iowa, 452; *Herman Ex.*, section 170.

Without delaying to remark upon other special features of the present case, it is sufficient to say the case is fully within the principles and authorities which controlled the judgment in *Fletcher v. McGill*, *supra*.

It follows that upon the facts found by the court the conclusions of law should have been in favor of the cross-complainant.

The judgment is accordingly reversed, with costs, with directions to the court below to restate its conclusions of law, and to render judgment thereon in favor of the appellant in accordance with this opinion.

Filed Jan. 3, 1889; petition for a rehearing overruled March 5, 1889.

No. 13,397.

McNUTT v. McNUTT ET AL.

ANTENUPTIAL CONTRACT.—*Consideration.*—*Marriage and Release of Marital Rights.*—*Descents.*—Where, in contemplation of marriage, a written antenuptial contract was executed between the prospective husband and his intended wife, reciting such fact, and that both have been married before, have children by such marriage, and have separate estates, and the parties agreeing therein that "the survivor of either shall take and hold no interest, or part of interest, by descent or otherwise, but the estate, both real and personal, shall descend to the heirs the same as it would if they had not married," the marriage and release of all marital rights or interest in the other's property constituted a valuable and sufficient consideration to support the contract, and the survivor (the widow) is barred from claiming any interest by descent or otherwise in the other's estate.

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SAME.—Consideration to Wife.—In such case it is not necessary that the consideration should equal the dower right of a wife.

SAME.—Consideration Fixed by Parties.—In the absence of fraud or mistake, the consideration fixed by the parties to a contract will be deemed sufficient.

SAME.—Impeachment by Lapse of Time.—The fact that the promise to marry was made six years before the antenuptial contract was executed will not impeach the consideration of the contract.

SAME.—“Heir” of Husband.—In such case, the fact that the husband died leaving no lineal descendant will not entitle the wife to any interest in his estate as “heir” or otherwise.

SAME.—Destroyed Contract.—Secondary Evidence.—Evidence tending to show that an antenuptial contract once existed, and that it was destroyed by a party thereto, is sufficient to let in secondary evidence.

WITNESS.—Discretion of Court.—It is within the discretion of the trial court to hear the testimony of a witness although not offered until after the evidence had been closed.

From the Clinton Circuit Court.

J. C. Suit, S. O. Bayless, W. H. Russell, F. F. Moore and R. P. Davidson, for appellant.

J. V. Kent, J. W. Merritt, S. H. Doyal and P. W. Gard, for appellees.

ELLIOTT, J.—There is evidence that a written antenuptial contract was executed between the appellant and her husband, Henry G. McNutt, since deceased, and that the writing was destroyed by her. This is the evidence upon which the trial court acted, and we can not disregard its decision upon this question of fact. There is also evidence that the contract was in these words :

“Article of agreement this day entered into by and between the said Henry G. McNutt and Eva McBride, both of Clinton county, State of Indiana :

“Whereas, the said Henry G. McNutt and Eva McBride contemplate marrying each other, and have both been married before, and have separate estates, and have children by such former marriages, it is therefore contracted and agreed by the said Henry G. McNutt and Eva McBride, that the

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survivor of either shall take and hold no interest, or part of interest, by descent or otherwise, but the estate, both real and personal, shall descend to the heirs the same as it would if they had not married."

We must take as conclusive the finding of the trial court upon questions of fact wherever it is supported by the evidence, and it is only a waste of time to argue in this court that the decision of the trial court is wrong because the weight of evidence is against it.

Eva McNutt was a widow and Henry G. McNutt a widower when this contract was executed. Both were of mature age, and both had children by their former marriages. The former was the owner of one hundred and seventy-two acres of land, which came to her from her first husband, and Henry G. McNutt was also the owner of real property. What personal property the appellant had does not appear.

The contract does not, in formal terms, recite that a consideration moved from the prospective husband to the intended wife, but it does show that it was made in contemplation of marriage, and that each released to the other all interest in each other's property. Here there were two elements of consideration, marriage and the release of a right which, but for the release, would flow from the consummated marriage. These elements of consideration were both of the class valuable. If the contract is to be judged by the ordinary rules of law, then there can be no possible doubt that on its face it imports a sufficient consideration, since a consideration fixed by the parties is by the courts deemed a sufficient one, for the courts will not, in the absence of fraud or mistake, substitute their judgment for that of the contracting parties. *Wolford v. Powers*, 85 Ind. 294 (44 Am. R. 16).

If this contract could be regarded as within the general rule, there would be no difficulty in disposing of the case, for there are two distinct elements of consideration embodied in it; but the difficulty arises upon the point made by the appellant, that a contract of this character requires a consid-

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eration which the court can affirm is equal to the dower right of a wife. In support of their position counsel refer us to the cases of *Curry v. Curry*, 10 Hun (N. Y.) 366, *Gould v. Womack*, 2 Ala. 83, *Power v. Sheil*, 1 Molloy, 296, and 4 Kent Com. (12th ed.) 56 n. a, 1 Bishop Married Women, section 247, and 3 Redfield Wills, 381.

There is much conflict in the authorities; the weight, however, is strongly against the appellant. Many of the modern cases hold that even where the wife has no estate of her own the marriage is of itself a consideration sufficient to support the contract of the prospective wife not to claim any interest in the lands of the husband.

Mr. Schouler clearly marks and defines the distinction—a distinction lost sight of in some of the cases—between a post-nuptial and an antenuptial agreement, shows that both classes are included within the generic term “marriage settlements,” and says: “In antenuptial marriage settlements, or what are called ‘marriage settlements,’ the marriage affords a sufficient consideration.” Schouler Domestic Relations, pt. II, chapter XIII, sec. 173.

This is a just deduction from what Mr. Bishop calls “the better authorities.” But we are not dealing with a case in which the prospective wife was without property of her own. She was the owner of one hundred and seventy-two acres of land acquired from her first husband. It is true that she did not own the fee, since, by force of our statute, the second marriage cut down her estate to one for life. *Mathers v. Scott*, 37 Ind. 303; *Teter v. Clayton*, 71 Ind. 237.

But, while she did not have a fee in the land acquired from her first husband, she did have an estate for life. Indeed, she had something more; she had an estate for life with a qualified right of alienation and a possible fee. R. S. 1881, section 2484. *Bryan v. Uland*, 101 Ind. 477.

It can not, therefore, be said that she was not the owner of property since she had, at least, a freehold estate. We know that the prospective husband yielded nothing except

the right that might have grown out of a possible fee, and we concur to a great extent in the view of appellant's counsel that he yielded no then present right in the property of his wife. *Prima facie*, at least, he could not have taken any estate in her land at her death, since, upon the happening of that event the children by the first husband would take by descent. While the argument of counsel establishes the proposition that the husband parted with no present and vested rights in the land of the wife, it does not prove that the appellant had not property of her own. The question, therefore, is not what is the rule where the prospective wife is without an estate of her own in land, but what is the rule where she is the owner of at least a freehold estate?

Our judgment is that where the prospective wife is the owner of land in her own right, and there is no fraud, and nothing making the contract unconscionable, the courts will not strike it down. Here there was no fraud. The parties were of mature years. The subject had been long under consideration. There was deliberation, not haste. There is nothing unconscionable in the contract. It was no more than equitable that the prospective husband should, at the time he made the contract, provide that his estate should go to his children by a former wife. It is, indeed, difficult to find any principle upon which courts can set aside contracts made in good faith, with due deliberation, and by persons of mature age, even though that contract be one between a man and a woman contemplating marriage. It is stretching, as many of the authorities suggest, the power of the courts a great ways to declare that a man and woman may not, even though the latter has no estate of her own, make their own contracts. In earlier ages there was, perhaps, some reason for the old English law rule, for women were not educated then as now, and were far more under the dominion of the men than in these days. The reason for the rule has failed, and where the "reason faileth the rule faileth." But whatever may be the rule, where the woman has no estate of her own,

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it is different, and it ought to be different, where she has in her own right a freehold estate in land. An illustration will, we believe, prove our conclusion. Suppose the woman's freehold estate to be of great value, yielding an annual income of ten thousand dollars. Why should courts, in such a case interfere and annul an antenuptial contract made and acted upon in good faith? Upon what imaginable ground of public policy could such an interference be justified? If she does own an estate in land, and if there is no fraud, and nothing unconscionable, she should be allowed to judge for herself whether the marriage is of itself a sufficient consideration, and courts should not, after the husband's death, substitute their judgment for hers. The truth is, it is exceedingly difficult to imagine why, in any case where there is no fraud, courts should displace the judgment of contracting parties and substitute their own. No persons in the world can so well and so justly judge as the contracting parties themselves, and it is only in the strongest and clearest cases that courts should disregard their judgment, and never where there is neither positive wrong nor a fraud.

The authorities sustain our conclusion. The case of *Jacobs v. Jacobs*, 42 Iowa, 600, is very like the present, and we quote from the opinion in that case: "It is claimed, however, that the contract is unreasonable and without sufficient consideration, and, therefore, ought not in a court of equity to be enforced. * * The law always looks upon marriage as a civil contract, and this marriage seems to have been purely a business transaction. So far as appears, the contract was freely and voluntarily entered into, without any fraud or imposition. One of the parties was a crippled widower, sixty-two years old, with eleven children, and real estate worth \$12,000; the other, a widow with three children, forty acres of land and \$700 or \$800 in money. They were willing to marry, but each wanted the sole control of his or her own property and to transmit it to his or her children." In concluding its observations on this point the court said:

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“ We can not say but that the advantages are about equal, and the contract is fair and reasonable. We know of no reason why it should not be enforced.” In *Wentworth v. Wentworth*, 69 Me. 247, the court held an antenuptial contract valid, although it made no provision at all for the woman except that the husband should not intermeddle with her property. The court, in the course of the opinion, said, in speaking of the contract: “ It was made in consideration of marriage, although it is not so declared in terms, *Naill v. Maurer*, 25 Md. 532. Marriage is the highest consideration known to the law. *Ford v. Stewart*, 15 Beav. 499; *Maguiac v. Thompson*, 7 Pet. 348; *Vance v. Vance*, 21 Me. 370. Even if it were otherwise, the reciprocal character of the stipulation might well constitute a sufficient consideration. *Naill v. Maurer*, *supra*.” The conclusion of the court in the well considered case of *Forwood v. Forwood*, 5 S. W. Rep. 361, is thus expressed: “ There is another class of cases that hold (and with which we agree) that an antenuptial contract is a legal contract, the consideration of which may be—*First*, that of the intended marriage alone; or, *second*, that of a jointure or settlement upon the intended wife in lieu of her dower or distributable share in her intended husband’s estate; and that either of these considerations, if both parties are *sui juris*, is sufficient to uphold the antenuptial agreement on the part of the woman to relinquish her right of dower and distributable share in her intended husband’s estate.”

In a similar case the Supreme Court of Maryland said: “ The contract was made in contemplation of marriage, and, as clearly appears, was intended to bar or prevent the acquisition thereby of any right by either in the property of the other, in order that the marriage proposed might take place. The main object in view was the consummation of the marriage, and it was to that end that the contract was executed. It seemed almost impossible to view the contract as founded on any other consideration, although the reciprocal character of the stipulations might be held to constitute one sufficient

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to make the contract binding and effective. But whether the marriage they proposed be expressly mentioned as a consideration or not, we think it must be regarded as such within the purview and meaning of the contract; and we accordingly hold that the contract can not be avoided on that ground." *Naill v. Maurer, supra.*

The court in deciding the case of *McGee v. McGee*, 91 Ill. 548, thus expressed its view of the law: "The contract, in our judgment, is a reasonable one. It is one that persons advanced in life could, with great propriety, make, and especially where the parties have previously been married, and where there may be children by both marriages, among whom controversies as to property may arise after the death of the parents. Such agreements are forbidden by no considerations of public policy, and there can be no reason why equity will not lend its aid to compel the surviving party to abide the contract. Our opinion is, the fair construction of the antenuptial agreement is, that it intercepts dower of the widow, and may be set up as an effectual bar to her demand for dower in the lands of which her husband died seized." This doctrine was reaffirmed in *Barth v. Lines*, 7 N. E. Rep. 679, and the cases of *Wentworth v. Wentworth, supra*, and *Andrews v. Andrews*, 8 Conn. 79, were cited with approval.

It was said in *Johnston v. Spicer*, 107 N. Y. 185, that "Antenuptial contracts, by which it is attempted to regulate and control the interest which each of the parties to the marriage, shall take in the property of the other, during coverture or after death, like dower, are favored by the courts and will be enforced in equity according to the intention of the parties whenever the contingency provided by the contract arises. (2 Kent's Com. 165; *Matter of Youngs*, 27 Hun, 54, affirmed, 92 N. Y. 235)."

In the case of *Andrews v. Andrews*, 8 Conn. 79, the judge who spoke for the court said: "I can see no reason why such an agreement, deliberately made, and upon sufficient consideration, should not be enforced in chancery. Such con-

tracts, especially in late marriages, are not unusual. They are opposed to no rule of law, nor to any principle of sound policy. On the contrary, they are, in my judgment, highly beneficial, and are eminently entitled to the aid of a court of chancery, where such aid is necessary to carry them into effect; and especially is this true, where the contract has been executed, in good faith, by one of the parties." It was said in the case of *Pierce v. Pierce*, 71 N. Y. 154, that "Antenuptial contracts, whereby the future wife releases her claim to her right of dower, and all other rights to the estate of her husband upon his decease, are fully recognized in law. When fairly made and executed without fraud or imposition, they will be enforced by the courts."

Nearer to the case under discussion than those last cited, but in line with them, is the case of *Gelzer v. Gelzer*, Bailey Eq. S. C. 387. In that case the court said: "The complainant was of full age, and under no legal disability to contract; the subject-matter was legitimate; and the consideration of marriage is sometimes said to be the highest known to the law; and I confess, that I have not been able to discover any rule, or principle, which discharges her from the obligation, which this agreement imposes. She had an ample fortune of her own, so tied up, that she could not confer it upon the husband; and in consideration, that he would take her in marriage, she agreed not to claim her dower, or any right of inheritance in his estate. It is a contract without fraud, and apparently of perfect equality. Both Atherly and Roper treat this question as one admitting of no controversy. A jointure, to operate as a bar to dower under the statute, must consist of a freehold estate; but a woman, under no legal disability, may stipulate to substitute anything she pleases in place of it. Atherly *Marriage Settlements*, 511; 1 Roper *Husband and Wife*, 480."

We pause in our examination of the authorities to say of the case just cited, that the woman's property was entailed, and that the husband could by no possibility take any es-

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tate in it, so that he released no right in the woman's property. It is true that in the case cited the woman's fortune was ample, but the extent of her estate, if at all considerable, can not affect the principle involved, since she should be allowed to judge of its sufficiency, and there is no reason why the courts should interfere.

The opinion in *Hafer v. Hafer*, 33 Kan. 449, is an elaborate one, gathering and grouping many authorities. It was there said of an antenuptial contract not unlike the present: "It was held in the court below, that the contract was without consideration. Clearly, this is not so. In addition to the reciprocal agreements therein, it has for its support the consideration of marriage, which is not only a valuable consideration, but has been held to be 'the highest consideration known in law,' and is indisputably sufficient to sustain an antenuptial contract."

We can not add to the length of our opinion by further discussion of the decisions of other courts, and turn to some of the decisions of our own court. These decisions do not, indeed, directly decide that a woman who has an estate of her own may execute a valid antenuptial contract founded on the consideration of marriage alone, but we think they do impliedly assert this doctrine.

In *Richards v. Richards*, 17 Ind. 636, the provision made by the antenuptial contract was not the equivalent, by any means, of the estate the statute would, but for the contract, have vested in the wife, yet the agreement was held valid. Substantially the same ruling was made in *Houghton v. Houghton*, 14 Ind. 505. That we are not in error in asserting that these cases impliedly approve the rule we have stated, is clear, for if they did not, then the conclusion declared could not have been reached, for the provision for the wife was not in either case equal to the right substituted by our statute for that of dower.

We can not in detail speak of all the authorities cited by appellant's counsel, but will briefly notice such as are most

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earnestly urged in argument. First in importance of these authorities, in the estimation of counsel, seems to be the case of *Mowser v. Mowser*, 87 Mo. 437, but we think it not at all in point, because it rested entirely on a statute of Missouri, and the contract was by parol and not in writing. In *Hollowell v. Simonson*, 21 Ind. 398, no question concerning the validity of an antenuptial contract was considered or decided. *Craig v. Craig*, 90 Ind. 215, decides that an antenuptial contract can not be revoked by parol after marriage, and *Corey v. Corey*, 81 Ind. 469, simply decides that an antenuptial contract may so provide for the wife as to make it proper to deny her alimony. The point affirmed in *The Camden, etc., Ass'n v. Jones*, 23 N. J. Eq. 171, is that where the annuity provided by the antenuptial contract fails, so does the contract. *Gibson v. Gibson*, 15 Mass. 110, and *Hastings v. Dickinson*, 7 Mass. 153, are placed solely on the statute of Henry VIII, and were decided as strictly common law cases, without reference to the equity rule, which, both in England and America, has long been different from the rigid rule of the common law. *Curry v. Curry*, 10 Hun, 366, is repudiated by the later cases in the same court and in the court of appeals. It is deservedly and strongly criticised in *Wentworth v. Wentworth*, *supra*. In the case of *Young v. Hicks*, 27 Hun, 54, it was said: "The agreement in the present case is a good antenuptial agreement even under the case of *Curry v. Curry*, 10 Hun, 366. It makes a provision in lieu of dower and of the rights of the widow in the husband's estate. The principle decided in that case that such a consideration must be proven to uphold an agreement made in contemplation of marriage does not seem to be supported by any good reason."

The disapproval of *Curry v. Curry*, *supra*, is repeated in *Clark v. Clark*, 28 Hun, 509, where it was said: "We can not concur in the observation of the learned judge in that case, that antenuptial contracts are against public policy. On the contrary, we think that the current of decisions respect-

ing marriage settlements shows that when such contracts are freely and fairly entered into, they are generally conducive to the welfare of the parties thereto and subserve the best purposes of the marriage relation."

The Supreme Court of New York, judged by its latest utterances, may, therefore, be regarded as strongly against the appellant, and in line with the great majority of the modern courts.

The case of *Grogan v. Garrison*, 27 Ohio St. 50, confuses postnuptial with antenuptial contracts, and applies to the latter class of contracts the rules applicable to the former. This error led to a wrong conclusion, for it led the court to apply a statute applicable only to conveyances and contracts made after marriage to contracts made before marriage. That this is true is apparent from what is said on pages 59 and 62 of the opinion. But if it were conceded that the case cited is rightly decided, still, it would not be applicable here, for in that case there was absent an important element which is here present; this element is the fact that the wife had a separate estate of her own.

The later case of *Mintier v. Mintier*, 28 Ohio St. 307, lays down an essentially different rule from that laid down in the former case, for it was there said: "If the antenuptial agreement in this case was intended by the parties to operate as an equitable jointure, and as such to bar all claims of the wife to dower in the real estate of the husband; if the parties were of mature age, and capable of judging in respect to their interests; if the agreement was fairly entered into in good faith, and without any fraud or imposition; if it was reasonable in its terms, and was in good faith acted upon and carried into effect by Robert Mintier during his life, no good reason is perceived why full effect should not be given to it, according to the intention of the parties."

In the earlier case of *Stilley v. Folger*, 14 Ohio, 610, the court said: "Antenuptial contracts have long been regarded as within the policy of the law, both at Westminster and in

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the United States. They are in favor of marriage and tend to promote domestic happiness, by removing one of the frequent causes of family disputes, contentions about property, and especially allowances to the wife. Indeed we think it may be considered as well settled, at this day, that almost any *bona fide* and reasonable agreement, made before marriage, to secure the wife in the enjoyment either of her own separate property, or a portion of that of her husband, whether during the coverture or after his death, will be carried into execution in a court of chancery."

It is evident that in Ohio the rule, as laid down by the well considered cases, is not very different from what we have embodied in our conclusion and stated as the rule applicable to this particular case. We have restricted our statement of the rule because it is not here necessary for us to make our statement broader, but we may appropriately say that the cases go very far to support the rule as thus stated by Mr. Freeman in his note to the case of *Merritt v. Scott*, 50 Am. Dec. 372: "The marriage itself is the consideration of the settlement, and it is the highest consideration known to the law."

Mr. Bishop employs even stronger language: "To say, therefore, that it is to be regarded, where it is the inducement to any contract, as a valuable consideration, is to utter truth, yet only a part of the truth. What this utterance lacks is, in our books, not unfrequently expressed by the adjective 'highest;' as 'marriage is the highest consideration known in law.'" 1 Bishop Married Women, section 775.

No particular form of words is necessary to constitute a valid antenuptial contract. However informal the instrument may be, it will be given effect if the intention of the parties is manifested, and it is such as can at law or in equity be executed. "This sort of agreement," says an eminent text-writer, "will, of course, vary in its terms, according to the inclinations of the parties; but, without regard to such variations, it should be held, alike on principle and on the

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better authorities, to exclude dower where such is the plain intent of the parties." 1 Bishop Law of Married Women, section 423. In truth, not only do the authorities affirm that no formality is required, but they go further and declare that such contracts are to be construed with liberality and favor. They will be upheld if possible, and not overthrown, unless the necessity leading to that result is imperious. As Mr. Schouler says: "Equity pays no attention to the externals, but considers only the substantial intention of the parties." Schouler Domes. Rela., section 176. The cases enforce and illustrate this rule in many forms. *Neves v. Scott*, 9 How. 196; *Hooks v. Lee*, 8 Iredell Eq. 157; *Smith v. Moore*, 3 Green Ch. 485; *Johnston v. Spicer*, *supra*, and cases cited; *Hafer v. Hafer*, *supra*.

It has even been held that letters between the parties, although informal, will be sufficient evidence of the contract. *Logan v. Wienholt*, 1 Cl. & F. 611; *Hammersley v. De Biel*, 12 Cl. & F. 45; *Kinnard v. Daniel*, 13 B. Mon. 496; *Peck v. Vandemark*, 99 N. Y. 29.

Reason and authority are both in favor of a liberal construction of these contracts, for their purpose is to prevent strife, secure peace, adjust rights, and settle the question of marital rights in property. From the earliest years of the law the courts of chancery, rejecting the iron rules of the common law, have favored contracts of this character, and this rule of equity has been engrafted into the body of American jurisprudence. *Andrews v. Andrews*, *supra*; *Pierce v. Pierce*, 71 N. Y. 154; *Barth v. Lines*, 7 N. E. Rep. 679; *Jacobs v. Jacobs*, *supra*; *Beard v. Beard*, 22 W. Va. 130; *Shuee v. Shuee*, 100 Ind. 477; *Wright v. Jones*, 105 Ind. 17-27.

Measuring this contract by the rules of law, reading it by the light of the attendant circumstances, and looking to the object the parties intended to accomplish, there can be no doubt as to the effect that should be given its provisions. Those provisions were intended to constitute a valid mar-

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riage settlement, and they do constitute such a settlement, divesting the wife of all interest in the husband's property, and freeing hers from any possible claim that he might otherwise have. The contract not only freed the wife's land from a claim upon the interest held by her at the time the contract was made, but it frees it from all interest which she might subsequently acquire. *Cole v. American Baptist, etc., Society*, 14 Atlantic R. 73. It not only governs as to her fixed interest, but also as to the possible or contingent interest which she had in the land when she entered into the contract. It is a mistake, therefore, to assert that there was no interest released except that fixed and vested when the contract was made, for the contract operated upon possible and contingent interests as well as upon the then present and vested estate.

To remove all claims to each other's property was, it is very plain, the leading purpose of the parties, and the court would do wrong to frustrate that purpose. The contract has long existed, has been acted upon, one of the parties is dead, and the courts can not do otherwise than read the contract as the parties wrote it and as they intended it should be read.

Turning from the main path to a point which counsel make, and which leads us aside, we affirm that the fact that a promise to marry was made six years before the writing was drawn and signed does not impeach the consideration of the contract. The written instrument, as the authorities agree, merges mere oral negotiations, expresses the matured agreement of the parties and supplies the best evidence upon the subject of property rights. If parties put in writing their agreement concerning their property and subsequently marry, the agreement, as written, is the source of evidence, and furnishes conclusive proof of the matured and final contract. But if there were doubt as to our statement and application of this elementary principle, still the extraneous evidence is strongly against the appellant upon this question, for it shows

that she made the final agreement to marry only upon terms such as those expressed in the writing. Her declarations, expressed in language much more emphatic than elegant, show that she exacted the contract, and that without it she would not have taken McNutt as her husband. Both the parol and the written evidence show that the contract was made in consideration of marriage, and that not only that consideration, but the further consideration that each should release all rights in the other's property, entered into the contract, and give support to the agreement.

The child of Henry G. McNutt, by his first marriage, died before he did, leaving no children. The appellees are the brothers and sisters and nephews and nieces of Henry G. McNutt. The appellant's counsel insist that even if the validity of the antenuptial contract be affirmed, still the appellees can not take to the exclusion of the appellant because the marital rights of the widow are barred only in favor of the lineal descendants of the husband. Counsel thus state their propositions:

"The appellees being only collateral relations of Henry G. McNutt, and there being no limitation in the contract for their benefit, they are not within the consideration of the antenuptial contract, but are mere volunteers, and can not enforce the provisions of that contract against appellant.

"The term 'heirs,' as used in the antenuptial contract, relates to the then living children of Henry G. McNutt and of Eva McBride, who are specifically mentioned in the contract, and is not used in its technical sense at all. It follows that, the contract having been made for the benefit of Lawrence McNutt only, the appellees can not have it specifically performed for their benefit."

The position of counsel is untenable. The word "heirs" is one of the strongest and most expressive terms in the law. *Allen v. Craft*, 109 Ind. 476, 480 (58 Am. R. 425); *Shimer v. Mann*, 99 Ind. 190 (50 Am. R. 82); *Hochstedler v. Hochstedler*, 108 Ind. 506. Where this word is employed it will

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be given its settled legal meaning, unless the context shows in the clearest and most decisive manner that the parties who used it intended that it should have some other meaning. *Allen v. Craft, supra*; *Shimer v. Mann, supra*; *Jesson v. Wright*, 2 Bligh (H. L. Cases), 1 (56); *Doe v. Gallini*, 5 B. & Ad. 621; *Lees v. Mosley*, 1 Y. & Coll. Ex. Cases, 589; *Powell v. Board, etc.*, 49 Pa. St. 46 (53); *Robins v. Quinliven*, 79 Pa. St. 333; *Den v. Emans*, 2 Pen. (N. J.) 522. Where there is doubt, say the authorities, the word will be taken in its accepted legal signification. Heirs are lineal and collateral, but the generic term includes both classes. Children in the lifetime of the parents may be heirs presumptive, but they are not heirs. *Schoonmaker v. Sheely*, 3 Denio, 485; 1 Preston on Estates, 367. It is an ancient maxim that "No one can be an heir during the lifetime of his ancestor." But in this instance the context of the instrument and the attendant facts very satisfactorily show that the parties intended to bar the rights of each in the property of the other, and to secure it to their respective descendants. The appellees are the heirs of Henry G. McNutt, and as heirs entitled to the real property of which he died seized. *Cole v. American, etc., Society, supra*.

Another proposition of counsel is thus stated: "But even if the term 'heirs' be given its strict technical meaning, it does not avail appellees, because by operation of law, which she can not prevent, appellant is the only 'heir' of Henry G. McNutt, and appellees are not his heirs at all. She could not by contract change her legal status."

There is a fallacy in this statement, for it contains covert assumptions which are not only unproved, but which are incapable of proof. It is not true that an antenuptial contract changes the status of the woman. This is evident because: 1st. When it was made she was not a *feme covert*. 2d. It does not affect the status of the wife, when the marriage takes

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place, but simply the property of the husband and the wife respectively. 1 Bishop Married Women, section 427.

It is unduly assumed that the law absolutely casts upon the wife an estate in the lands of the husband ; whereas it does not undertake to do so where by agreement the parties have fixed the rule which shall govern. The law operates in cases where there is no contract, but does not operate where the parties have for themselves agreed upon the mode in which marital rights shall attach. The law does not assume to override the agreement of the parties, but to furnish a rule where there is no agreement. To be sure, there must be an effective agreement or conveyance ; if there is not the law will prevail.

There is little, if any, diversity of opinion upon the general proposition that parties may by contract intercept the line of descent, although there is some conflict as to what must be shown to support the contract. The rule long has been that dower and kindred rights may be excluded by the contract of the parties. 1 Bishop Law of Married Women, 427.

Speaking of contracts of this class, Mr. Bishop says : " It is doing what is done every day in other things,—namely, providing a rule by agreement to be applied instead of the rule which the law would furnish in the absence of an agreement." 1 Bishop Married Women, section 418.

The rule as we have stated it is affirmed by the text-writers, and has been declared and enforced by many courts. *Naill v. Maurer, supra* ; *Wentworth v. Wentworth, supra* ; *Pierce v. Pierce, supra* ; *De Barante v. Gott*, 6 Barb. 492 ; *Beard v. Beard*, 22 W. Va. 130 ; *Charles v. Charles*, 8 Gratt. 486 ; *Spiva v. Jeter*, 9 Rich. Eq. 434 ; *Merritt v. Scott*, 6 Ga. 563 (50 Am. Dec. 365).

The decision in the case of *Wiseman v. Wiseman*, 73 Ind. 112, does not lend any support to the argument of appellant's counsel, but, on the contrary, is in direct hostility to it. " Under our statute," said the court in that case, " a surviving wife, who has not conveyed or relinquished her interest in the property of the husband, or accepted a jointure,

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or received a valid antenuptial settlement, can be deprived of her rights in the land of her deceased husband for one cause, and for one cause only."

There is, it is obvious, a full recognition of the validity of antenuptial contracts, and not a denial, in the decision from which we have quoted. We conclude this phase of the subject by a quotation from one of our approved text-books, and here assert it as the rule of decision. The author, after commenting on the decided cases, says: "It is but a step from such a case as this to another one of which there are several in the books, where the parties agree beforehand that, after marriage, each shall hold his or her antenuptial property to his or her separate use, and on the death of one of them, neither shall have any marital claim on the estate of the other. This is, at least in a court of equity, generally esteemed to be a good bar to dower." 1 Bishop Law of Married Women, section 423.

Counsel state an argument in the form of a question thus:

"Was not the agreement not to claim marital rights an agreement not to claim a future demand not then in existence? If so it was void."

This is substantially nothing more than a re-statement of an argument of which we have already disposed, but, as it will serve to put our position in a stronger and clearer light, we will give Mr. Bishop's refutation of such arguments: "The principle governing these cases," says he, "it should be remembered, is, not that the antenuptial contract constitutes a release of dower—for a thing not existing can not be released—but it is an undertaking not to claim dower—an introduction of a rule by agreement differing from the one which the law provides in the absence of an agreement. For the principle is well settled, that, though parties marrying must take the status of marriage as the law has established it, and can not vary it by antenuptial contract, yet, within certain legal limits, and proceeding by a legal rule, they may by such contract vary any or all of those property rights

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which the status superinduces." 1 Bishop Law of Married Women, section 427.

The argument that the appellant is an heir of Henry G. McNutt, and, therefore, entitled to the land, is fallacious. It is very clear that the agreement was meant to exclude her, and that it does exclude her from the inheritance. The object of the agreement was to bar her rights in the land of her husband. This was the plain intention of the parties, and that intention must prevail. To award her an interest would be to give her what the contract plainly denies her, and thus thwart the intention of the parties and defeat their agreement. But counsel are in error in assuming that a widow is an heir of her deceased husband in the legal sense of the term. As said in *Unfried v. Heberer*, 63 Ind. 67: "A widow is an heir of her husband only in a special and limited sense, and not in the general sense in which that word is usually used and understood." In *Brown v. Harmon*, 73 Ind. 412, and *Wood v. Beasley*, 107 Ind. 37, it was held that where a testator devised land to his widow as long as she should remain his widow, and directed that upon her marriage it should go to his heirs, the widow could not claim as heir. These cases rule here. They simply announce that courts will give effect to the manifest purpose of testators and contracting parties, and that where it appears that a widow was not intended to be dealt with as an heir, she can acquire no rights in that capacity.

It is argued by counsel that the complaint asserts that the appellees have a legal title, and that they can not recover upon the title proved, because it is an equitable one. In support of this contention we are referred to the cases of *Stout v. McPheeters*, 84 Ind. 585; *Burt v. Bowles*, 69 Ind. 1; *Brown v. Freed*, 43 Ind. 253; *Nichol v. Thomas*, 53 Ind. 42; *Rowe v. Beckett*, 30 Ind. 154; and *Stehman v. Crull*, 26 Ind. 436.

We think that the only case that applies here is *Burt v. Bowles*, *supra*, and that the decision in that case is adverse to

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the appellant. This we say, because the second paragraph of the complaint specifically sets forth the title of the appellees, and the evidence establishes the substance of the issue tendered by that paragraph. Under the ruling in *Burt v. Bowles, supra*, this entitles the appellees to a recovery. The facts alleged in that paragraph entitled the appellees to recover possession of the real estate, and it is the facts, and not the prayer, that control. But if it were conceded that the form of the judgment was not correct, still, as the appellant did not move to modify it, he can not now present that question. Many cases hold that objections to a judgment must be presented by the proper motion to the trial court, or they will not be regarded on appeal. There is still another reason why there can be no reversal, and that is furnished by section 658 of the code, which provides that no judgment shall be reversed "where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below."

There was no error in admitting parol evidence of the contents of the antenuptial contract. There was evidence tending to show that it had been destroyed by the appellant, and this, combined with the evidence that it once existed, was sufficient to let in secondary evidence.

It was within the discretion of the trial court to hear the testimony of a witness, although it was not offered until after the evidence had been closed. We can only interfere where there is a clear abuse of discretion resulting in injustice, and we can not hold that there was such an abuse of discretion in this instance.

Judgment affirmed.

Filed Dec. 11, 1888; petition for a rehearing overruled March 13, 1889.

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No. 13,240.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. BUCK, ADMINISTRATOR.

NEGLIGENCE.—*Injury Resulting in Death.—Implied Damage.—Defective Machinery.*—The law will imply pecuniary loss in some amount to the wife and child, by the death of the husband and father, who was, at the time, employed and presumably receiving wages, and, therefore, able to discharge his obligation to support them; and a complaint, showing these facts, and that his death was caused by defective machinery owned and used by his employer, a railroad company, is sufficient.

SAME.—*Injury on Sunday.—Recovery for.*—The fact that decedent received the injury on Sunday while engaged in common labor will not prevent a recovery therefor.

SPECIAL VERDICT.—*Instructions.—Practice.*—Where the jury are required to return a special verdict, general instructions upon the law of the case are not proper, and error predicated upon the giving or refusal to give such instructions is not available.

SAME.—*Defects.—How Reached.*—Where the jury return a special verdict, the failure to find as to any facts in issue is not ground for a *venire de novo*. Courts will assume a failure of proof as to the facts not found, on such motion, though such omission might be ground for a new trial.

EVIDENCE.—*Res Gestæ.—Declarations.*—Declarations of a decedent made within two minutes after the injury was sustained, while he remained in the presence of the train and the defective machinery causing the injury, are admissible as part of the *res gestæ*.

From the Benton Circuit Court.

G. W. Easley, G. R. Eldridge, G. W. Friedley, S. O. Bayless, T. L. Sullivan and A. Q. Jones, for appellant.

J. R. Coffroth, T. R. Stuart and E. P. Hammond, for appellee.

MITCHELL, J.—Buck, as administrator of the estate of George H. Bennett, deceased, commenced suit against the Louisville, New Albany and Chicago Railway Company, alleging that the company had wrongfully caused the death of the decedent, to the damage of his surviving widow and child.

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The complaint was in three paragraphs. It is charged in the first two paragraphs that the intestate was in the employ of the railway company as brakeman, and that he was fatally injured while uncoupling cars, on account of dangerous and defective appliances and machinery which the company negligently supplied.

The same facts, substantially, were stated in the third paragraph, with the addition, that the accident and fatal injury to the plaintiff's intestate was caused by the careless and negligent habits, and by the incompetency, of the engineer who had control of the engine at the time the accident happened, and that the incompetency and negligent habits of the engineer were known to the company and unknown to the intestate.

No question is made as to the sufficiency of the complaint, except it is urged that it does not sufficiently appear by any averment therein that the widow or child of the decedent sustained damage in any wise on account of the defendant's negligence.

The averments in the complaint relevant to the point thus made are, that Bennett was in the employment of the defendant as brakeman at the time of his death, and that he left surviving him as his next of kin and only heirs his widow, Fidella J. Bennett, and his daughter, Longretta May Bennett, both of whom are still living, the latter being four years of age.

It is also averred that "Said administrator brings this action for the use and benefit of said widow and child, who, by reason of the death of said decedent as aforesaid, had sustained damages in the sum of ten thousand dollars."

For the appellant it is insisted that the general averment that the widow and child of the decedent had sustained damage in a specified sum, was not sufficient, but that the pecuniary loss, either present or prospective, resulting to them from the intestate's death, should have been specially pleaded. *Regan*

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v. *Chicago, etc., R. W. Co.*, 51 Wis. 599, is relied on to sustain the view thus contended for.

Without pointing out the distinction between the case cited and that under examination in respect to the question involved, it is sufficient to say it appears in the complaint in the present case that the decedent was, at the time of his death, in the employ of the railroad company as a brakeman, and that he left a widow and one child four years old. It is an unavoidable inference, therefore, that he was in the vigor of manhood, and that he was, at that time, engaged in earning money for the support of his wife and child. *Kelley v. Chicago, etc., R. W. Co.*, 50 Wis. 381.

Section 284, R. S. 1881, gives a right of action to the personal representative, for the benefit of the widow and children, or next of kin, of one whose death has been caused by the wrongful act or omission of another, provided the former could have maintained an action against the latter had he lived.

While there is some discord in the decisions of courts, in respect to the right to maintain the action, even for nominal damages, without averring and proving actual pecuniary loss by those for whose benefit the suit is brought, there can be no doubt but that within the rule generally prevailing, the law will imply substantial pecuniary loss in some amount to the wife and child from the death of one who sustained the relation of husband and father to them, and who was at the time presumably receiving wages, and who was therefore possessed of the ability to discharge his obligation to support those dependent upon him. *Atchison, etc., R. R. Co. v. Weber*, 33 Kan. 543; *Houghkirk v. President, etc., D. & H. C. Co.*, 92 N. Y. 219; *Shearman & Redfield Neg.* (4th ed.), section 137.

Whatever the rule may require as applied to other cases, and in respect to the *quantum* or character of proof on the subject of pecuniary loss, there can be no doubt but that a general averment of damages in a case like the present is

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sufficient as against a demurrer to the complaint. It may be well to observe here, as applicable to this question, which is presented in another aspect later on in the record, that no precise rule for estimating the loss recoverable under the statute can be laid down. When the relation of the party, whose death has been caused, to those for whose benefit the suit is being prosecuted, has been shown, and his obligation, disposition and ability to earn wages or conduct business, and to care for, support, advise and protect those dependent upon him, the matter is then to be submitted to the judgment and sense of justice of the jury. *Board, etc., v. Legg*, 93 Ind. 523; *Tilley v. Hudson, etc., R. R. Co.*, 29 N. Y. 252; *Castello v. Landwehr*, 28 Wis. 522.

The jury returned a special verdict, which, so far as they are material to the questions for decision, exhibited the following facts: The deceased, a man about thirty years of age, in good health and of industrious habits, was in the employment of the defendant railroad company as brakeman on a freight train. On Sunday night, November 25, 1883, the train, of which he was one of the crew, left Michigan City for Lafayette. Between 9 and 10 o'clock, the train was stopped at the crossing of the Pan-Handle railroad for the purpose of taking on more cars. It was part of the duty of the decedent to couple and uncouple cars which were to be attached to, or detached from, the train. Soon after the train stopped, he went in between the engine and the car attached to it for the purpose of uncoupling the car from the engine. The car was loaded with lumber, and belonged to the defendant company, but the decedent had never seen it until after it was loaded, when starting from Michigan City. The reach-rod, which when properly adjusted held the brake-beam in place, was, and had been for several days, absent from the brake-beam in front of the wheels on the car next the engine. The absence of this rod was unknown to the decedent, but the jury find that it was, or might have been, known to the defendant. Its absence caused the beam to hang lower and

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more forward than it otherwise would have done, but the fact that the rod was gone was not discoverable except by one stooping down and looking under the car. While attempting to uncouple the car, being for some reason unable to get the coupling pin out of the draw-bar, the decedent held the pin up as far as he could get it, and then signalled the engineer to move the engine forward. The engineer obeyed the signal, but immediately, and without warning, reversed the lever and threw the engine back, crowding the decedent against the car, and then again moved forward. While so crowded back, and before he could recover or extricate himself from his position, the decedent's feet were caught by the defectively attached brake-beam, and he was thrown under, and run over by the car, which was moving forward. In this way he received injuries which are particularly described, and which resulted in his death the following morning. It was found that the decedent left a widow and child, as alleged in the complaint, and that they were damaged by his death in a specified sum. There was judgment for the plaintiff accordingly.

The appellant insists that the judgment ought to be reversed, and urges as one of the reasons, that the jury found that the injury which resulted in the intestate's death, was received on Sunday, while he was engaged at common labor, in pursuance of a contract with the railway company, and that it was not made to appear that the work, about which he was engaged, was a work of necessity. We had occasion to consider this question in *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18, where it was presented in substantially the same manner as in the present case. Our conclusion then was, that a person, injured by the negligent omission of another to perform a legal duty, would not be denied a recovery, even though it appeared that the injured person was, at the time of receiving the injury, acting in disobedience of his collateral obligation to the State, which required of him the observance of the Sunday law. If the railway

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company violated its duty by furnishing machinery and appliances which it knew were defective, the danger to an employee who was required to use the appliances, in ignorance of their defective condition, was the same on one day as on another. That they were being used on Sunday, rather than on Monday, neither contributed to, nor was it the efficient cause of, the injury which gave rise to this action, nor can the railroad company now interpose and become the champion of the Sunday law as an excuse for its wrong, or to defeat a recovery. *Sutton v. Town of Wauwatosa*, 29 Wis. 21.

It is quite true that a plaintiff will in no case be permitted to recover when it is necessary for him to prove his own illegal act or contract as a part of his cause of action, or when an essential element of his cause of action is his own violation of law. *Holt v. Green*, 73 Pa. St. 198; *Coppell v. Hall*, 7 Wall. 542, 558; *Steele v. Burkhardt*, 104 Mass. 59; *McGrath v. Merwin*, 112 Mass. 467.

But where he can prove his cause of action without proving that he was violating the law, even though it appears incidentally that he was at the time acting in disobedience of some statute, unless his illegal act was the efficient or proximate cause of the injury complained of, or unless the illegal act or contract is the foundation of his action, a recovery may be sustained nevertheless. *Cooley Torts* (2d ed.), pp. 178-179.

Whoever travels about from place to place for the purpose of gaming with cards or otherwise, acts in violation of a criminal statute. It would hardly be claimed that a recovery against a common carrier would be denied if it appeared incidentally in evidence that a passenger injured through the carrier's negligence was travelling in violation of the statute against gaming. Why should a brakeman, who is required to work in violation of the Sunday law, be denied a recovery? The gist of the action in the present case is the negligent failure of the railway company to furnish safe and suitable appliances whereby the death of the

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plaintiff's intestate was wrongfully caused while he was in the company's service as a brakeman. The contract of employment, and the time when the injury occurred, were mere incidents to, and were in no respect the foundation of, the action. *Louisville, etc., R. W. Co. v. Frawley, supra; Frost v. Plumb*, 13 Am. L. Reg. 537.

It may be conceded that the decisions in some of the States are not all consistent with the conclusions above stated, but in our opinion these conclusions are in accord with the better view of the subject, and have the support of the weight of authority.

The defendant presented to the court forty-three separate instructions, and asked that they be given the jury. Of these, twenty were given and the balance refused. The refusal to give these instructions is made a ground of complaint.

It has frequently been ruled that where the jury has been required to return a special verdict, general instructions as to the law of the case are not proper. The court should explain to the jury distinctly what facts are material to be found within the issues, and give them such instructions as will enable them to find and settle the facts, so that the law may be applied to the facts found by the court. *Louisville, etc., R. W. Co. v. Frawley, supra; Louisville, etc., R. W. Co. v. Flanagan*, 113 Ind. 488.

Within this rule an examination of the instructions given by the court leaves no doubt but that the jury were adequately directed in respect to the facts necessary to be covered by the special finding.

Leaving out of view all of the facts found relating to the alleged negligence and incompetency of the engineer, and eliminating from the special verdict everything in the nature of conclusions of law, it seems to us the facts found make a case justifying a recovery. They show that the railroad company failed in its obligation to supply its employee with safe and suitable appliances and machinery to do the work required of him, and that it required him to use machinery

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which it knew to be defective. This established the company's negligence.

The special verdict also shows that the defect in the machinery was unknown to the decedent, that it was not obvious, and could not have been discovered except by stooping down and looking under the car. This showed that the employee was not guilty of contributory negligence in going in between the cars to uncouple them, notwithstanding the defective condition of the appliances.

It is settled beyond controversy that railroad employees are presumed to understand the nature and hazards of the employment when they engage in the service, and that they assume all the ordinary risks and obvious perils incident thereto. Such risks are presumably within the employee's contract of service. *Jenney Electric Light and Power Co. v. Murphy*, 115 Ind. 566.

This does not mean, however, that the latter may not repose confidence in the prudence and caution of the employer, and rest on the presumption that he has also discharged his duty, by supplying machinery free from latent defects, which expose the employee to extraordinary and hidden perils. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Hough v. Railway Co.*, 100 U. S. 213.

While the employer may expect that an employee will be vigilant to observe, and that he will be on the alert to avoid all known and obvious perils, even though they may arise from defective tools and machinery (*Atlas Engine Works v. Randall*, 100 Ind. 293), yet the latter is not bound to search for defects or inspect the appliances furnished him to see whether or not there are latent imperfections in or about them which render their use more hazardous. These are duties of the master, and unless the defects are such as to be obvious to any one giving attention to the duties of the occasion, the employee has a right to assume that the employer has performed his duty in respect to the implements and machinery furnished. *Bradbury v. Goodwin*, 108 Ind. 286;

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Little Rock, etc., R. W. Co. v. Leverett, 48 Ark. 333; *Fort Wayne, etc., R. W. Co. v. Gildersleeve*, 33 Mich. 133; *Hughes v. Winona, etc., R. R. Co.*, 27 Minn. 137; *Wood Master and Servant*, section 376.

The facts found very clearly furnish a basis for the application of the foregoing principles, and these principles, when applied to the facts found, sustain the judgment of the court upon the special verdict. Many of the instructions asked would, if they had been given, necessarily have required the jury to return very much of the evidence as part of their special verdict, while others would have required the statement of mere conclusions, which the jury could not properly draw. For example, in one of the instructions the court was asked to require the jury to find what was the proximate cause of the death of Bennett. In another, the court was asked to require the jury to describe in their verdict the appliances attached to the car for the purpose of breaking it. The facts showing the manner in which the accident and injury occurred, and the condition of the car and appliances attached having been particularly found and set out in the special verdict, it became a question for the court to determine whether or not the intestate's death was proximately caused by the negligent omission of duty on the part of the railroad company. We are unable to perceive how the court would have been aided in arriving at a correct conclusion if the jury had been required to describe the appliances in their verdict. The material facts in that connection were that there inhered in the appliances a hidden or latent defect which increased the ordinary and obvious perils of the service in which the intestate was engaged, and which made them an efficient agency in producing the fatal injury.

We have examined the other instructions asked and refused, and without commenting upon them in detail we need only say that the court committed no error in refusing them.

It is contended that the court erred in overruling a motion made by the appellant for a *venire de novo*. In this we do

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not concur. It must now be accepted as settled that a special verdict will not be considered as so uncertain, ambiguous or defective as that no judgment can be rendered thereon, because some of the issues in the case are not affirmatively or expressly settled or determined therein one way or the other. If the verdict is silent concerning any of the facts in issue, the court will assume, upon a motion such as that under consideration, that the party upon whom rested the burden of proof in respect to these facts, failed to prove them. If the failure to find the facts was contrary to the evidence, it may furnish a sufficient reason for a new trial, but the failure does not render the special verdict objectionable, nor does it afford any ground for a *venire de novo*. *Glantz v. City of South Bend*, 106 Ind. 305; *Deeter v. Sellers*, 102 Ind. 458; *Mitchell v. Colglazier*, 106 Ind. 464.

It may be conceded that there are some merely evidentiary facts found in the special verdict, and that it also embraces many statements which are essentially conclusions of law. Notwithstanding all this, it seems clear to us that, stripped of all these, the verdict is yet sufficient to lead up to and support the judgment, and that the motion can not be successfully urged on that account.

Questions are made and discussed concerning the propriety of rulings of the court in admitting evidence tending to show that the engineer who had the engine in charge at the time the decedent was injured was negligent and incompetent. According to our view of the case there was no reversible error in any of these rulings, for the reason that the special verdict sustains the judgment, even though all the facts pertaining to the competency or conduct of the engineer be eliminated from the case. While we have discovered no error in the ruling, we do not regard them of sufficient materiality to justify us in prolonging the opinion by setting them out separately and examining them in detail.

The only other question which requires consideration relates to the ruling of the court in admitting in evidence cer-

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tain declarations of the decedent, which were made immediately after he was injured and substantially while he was being extricated from under the wheels of the car which had passed over him. The conductor of the train testified that he was on the caboose when he received notice that the decedent was hurt, and that he immediately ran forward and found him under the rear end of the second car from the engine. The following is the testimony of the conductor upon which the objection is predicated: "When I took him out I asked him 'how did this happen?' He told me he was uncoupling the engine from the first car, but could not get the pin clear out of the draw-bar, and had to hold it up, and hallooed to the engineer to go ahead. He started and by some cause 'threw the engine over,' and came back against him before he could get out and crowded him back against the car, and the brake-beam catching his leg, pulled him down and the cars ran over him."

It is not always easy to determine when declarations having relation to an act or transaction should be received as part of the *res gestæ*, and much difficulty has been experienced in the effort to formulate general rules applicable to the subject. This much may, however, be safely said, that declarations which were the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself. *Toledo, etc., R. W. Co. v. Goddard*, 25 Ind. 185; *Commonwealth v. McPike*, 3 Cush. 181 (50 Am. Dec. 727); *Lund v. Inhabitants, etc.*, 9 Cush. 36; *Augusta Factory v. Barnes*, 72 Ga. 217 (53 Am. Rep. 838); *Insurance Co. v. Mosley*, 8 Wall. 397; *People v. Simpson*, 48 Mich. 474; *Keyser v. Chicago, etc., R. W. Co.*

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(Mich.), 33 N. W. Rep. 867; *Kirby v. Commonwealth*, 77 Va. 681 (46 Am. Rep. 747); *City of Galveston v. Barbour*, 62 Texas, 172 (50 Am. Rep. 519); *State v. Horan*, 32 Minn. 394 (50 Am. Rep. 583); *Little Rock, etc., R. R. Co. v. Leverett*, *supra*; *State v. Ah Loi*, 5 Nev. 99; *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396, 402; *Durkee v. Central Pacific R. R. Co.*, 69 Cal. 533; *Lambert v. People*, 29 Mich. 71; *Hill's Case*, 2 Gratt. 594; *Jordan's Case*, 25 Gratt. 945; *Harriman v. Stowe*, 57 Mo. 93; *Entwhistle v. Feighner*, 60 Mo. 215; *Elkins v. McKean*, 79 Pa. St. 493; *Hart v. Powell*, 18 Ga. 635; *Driscoll v. People*, 47 Mich. 413; *Casey v. New York, etc., R. R. Co.*, 78 N. Y. 518; *McLeod v. Ginther*, 80 Ky. 399; *Wharton Ev.*, sections 258-267.

Any other rule would in many instances operate to defeat the accomplishment of justice, by excluding evidence of the most trustworthy character. While some of the cases cited above carry the doctrine to its extremest length, they all illustrate and apply the general principles, consistent with the conclusions we have heretofore enunciated.

The declarations under consideration were made within, not to exceed, two minutes of the occurrence, while the declarant remained in the presence of the train, and the alleged defective machinery, which was instrumental in producing his hurt, and before he had been removed from the spot where he received his fatal injury. The surrounding circumstances, in the presence of which the declarations were uttered, were, therefore, silent witnesses in corroboration of his statement. This, taken in connection with the condition of the decedent, who was suffering under the shock of an injury from which he died in about six hours afterwards, necessarily excludes the idea of calculation or ability to manufacture evidence for future purposes. The court committed no error in admitting the evidence.

There are a number of incidental questions of minor importance presented and discussed by counsel, but so far as

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they are material to the case as we have felt constrained to consider it, they have all been disposed of by what has preceded.

Without entering upon a detailed examination of the evidence, which tends to support the verdict, we content ourselves with saying that while some of the criticisms of counsel seem plausible, and carry with them much force, we are nevertheless constrained to hold, since there was some evidence which the court and jury, whose duty it was to judge of its weight and credibility accepted as sufficient, that the judgment can not now be disturbed.

The judgment is, therefore, affirmed, with costs.

Filed Jan. 10, 1889; petition for a rehearing overruled March 30, 1889.

116	578
118	574
121	399
116	578
126	407
116	578
134	551
116	578
161	307
161	308
162	452
116	578
166	524
167	196
116	578
171	223

No. 10,826.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY
COMPANY v. THE CINCINNATI, WABASH AND MICHIGAN
RAILWAY COMPANY.

EMINENT DOMAIN.—*Railroad Crossings.—Condemnation Proceedings.—Instrument of Appropriation.—Pleading.*—In proceedings by one railroad company to condemn and appropriate a right of way across the tracks of another, under subdivisions 5 and 6 of section 3903, R. S. 1881, the complaint or instrument of appropriation set forth the effort to reach an agreement as follows: "Having located the line and route of its said proposed extension of road over the lands and premises hereinafter described, and having attempted and failed, and being unable to agree with respondent in regard to the terms of, or in regard to the compensation therefor," the plaintiff did take and appropriate said way.

Held, that the effort to agree must be made on the three points: Compensation, points of crossing, and manner of crossing and connections, and such effort is a condition precedent to the exercise of the power to appropriate.

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Held, also, that the instrument of appropriation must affirmatively show the agreement, or failure to agree, on each of these three points, and was, therefore, insufficient in this case.

Held, also, that the word "terms," as used in the instrument of appropriation, is not broad enough to cover the three essential points.

SAME.—Waiver.—Pleading.—There may be a waiver of an agreement, or of an effort to agree, but such waiver should be directly averred.

SAME.—Appeal as Waiver.—An appeal is not a waiver of any objection seasonably and appropriately made.

SAME.—Quære.—Does the statute confer the right upon a railroad corporation to appropriate and condemn a longitudinal part of the right of way of an existing railroad company?

SAME.—Nature of Civil Action.—Condemnation proceedings are not in the strict sense an ordinary civil action.

STATUTORY CONSTRUCTION.—Where the meaning of a statute is not clear courts will so construe it as to promote equity and justice.

From the Elkhart Circuit Court.

J. A. S. Mitchell and *J. H. Baker*, for appellant.

J. S. Frazer, *W. D. Frazer*, *C. Cowgill*, *H. B. Shiveley* and *C. E. Cowgill*, for appellee.

ELLIOTT, J.—The first question, presented in various methods, which we are required to decide, is this: What must be done by a railroad company, engaged in constructing a new road, to entitle it, as of right, to build its track across the road of a company previously built?

There is no doubt as to the right of one railroad company, upon the payment of compensation, to construct its road across that of another road already in existence, but the terms and conditions upon which it can be done are such as the law prescribes. *Lewis Eminent Domain*, section 268. A condition precedent to the right to cross is a compliance with the statute.

The road seeking the right to cross another must affirmatively show that it has performed the acts which the statute requires. In a recent work the law upon this subject is thus stated: "The petition should comply with the statute in all respects, and should contain all the facts necessary to give jurisdiction." *Lewis Eminent Domain*, section 348. Farther

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on in the same section the author says: "The allegations of the petition should be certain and positive. But where allegations were followed by the phrase 'as we believe,' they were held to be sufficiently positive. If the statute requires the petition to contain a particular statement, its omission will be fatal."

The general rule is that material matters must always be directly alleged, and not stated by way of recital, and there is no reason why the rule should not apply to such cases as this. *Jackson School Tp. v. Farlow*, 75 Ind. 118; *Shafer v. Bear River, etc., R. R. Co.*, 4 Cal. 294; *Hall v. Williams*, 13 Minn. 260.

It is, therefore, necessary in such cases as this to ascertain, first, what facts must be stated, and, second, whether they are positively stated, or merely stated by way of recital.

The contention of counsel upon the particular question stated, narrows the inquiry, for, as we understand the argument, the only point in which the petition, or instrument of appropriation, is asserted to be defective, is in the failure to aver that the two corporations "can not agree upon the amount of compensation to be made therefor, or the points or manner of such crossing." The statute which governs contains this provision, "And if the two corporations can not agree upon the amount of compensation to be made therefor, or the points or manner of such crossings and connections, the same shall be ascertained and determined by commissioners." R. S. 1881, section 3903, sub. 6.

It seems clear to us that this provision is not to be restricted to the single element of compensation, but that it must be construed as embracing also questions concerning the location and method of constructing the crossing. The language is not ambiguous, and it certainly embraces three very different and very material things—compensation, the point of crossing and manner of crossing.

We can not see how it is possible, looking solely to the words of the statute, to hold that all that it refers to is the mat-

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ter of compensation, since to reach such a conclusion many strong and clear words must be rejected. The language is plain, but plain as it is we think it not more plain than the object the Legislature intended to accomplish. It is very evident that the Legislature did not mean to invest the younger company with power to cross at any point and in any mode it might elect, but that, on the contrary, it meant to prevent the arbitrary exercise of the right to cross the older line. The purpose was to give both corporations an opportunity to agree, if they could, as to the compensation, the point of crossing and the mode in which the crossing should be constructed. It was the intention of the Legislature to prevent the arbitrary exercise of power by either the senior or the junior corporation, and to compel them to negotiate concerning the crossing, or, if the senior refused, to enable the junior to bring the matter before the court for consideration and judgment upon the three elements involved—the compensation, the point of crossing and the mode of conducting the one line across the other. This must be the interpretation of the statute, otherwise we must reject many words as meaningless and disregard the appropriately expressed intention of the Legislature. This result must be averted, for a firmly settled rule of law declares that no word or clause in a statute shall be regarded as meaningless or superfluous if it can be avoided. But there is much reason and justice in the statute as it is written, for, although it is just that the older company should not be allowed to arbitrarily dictate terms to the younger, it is equally just that the younger should not be allowed to make a crossing regardless of the rights of the older company. Our conclusion is that the negotiations which the statute requires the two corporations to conduct, are negotiations concerning the three things we have enumerated, and that if these three things can not be settled by negotiation they must be brought before the appropriate tribunal for adjudication.

The instrument of appropriation does not aver in positive

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terms that there was any failure to agree even as to the element of compensation, for all that is alleged on this subject is thus pleaded: "Having located the line and route of its said proposed extension of road over the lands and premises hereinafter described, and having attempted and failed, and being unable to agree with respondent in regard to the terms of, or in regard to the compensation therefor," the plaintiff did take and appropriate said way.

The allegations as to compensation seem to be made only by way of recital, and, therefore, probably insufficient; but, however this may be, there is certainly no allegation at all as to the other elements—the point of crossing and the mode of conducting the one line of railroad across the other. The petition does not, therefore, show any attempt to bring about an agreement upon the points required by the statute, for two, at least, of the essential points are not mentioned. For this reason we think the petition or instrument of appropriation is insufficient. It is defective not simply in form, but in substance. It is defective in substance because it fails to show an attempt to secure the agreement for which the statute provides. This defect is far-reaching, for, if the questions as to the point of crossing, and the mode of constructing the crossing, are not brought before the court, the senior corporation is practically denied the right to have two very important questions litigated and adjudicated. These two questions may, it is easy to conceive, often be of much more importance than the question of compensation. If the questions as to the place of crossing and the manner of making it are not the subject of judicial investigation, then it must be true that these are matters to be settled by one alone of the two corporations, and this would be plainly unjust, since the rights of both are directly involved and the rights of both vitally affected.

It is not equitable that either the senior or the junior corporation should be at unrestrained liberty to dictate terms to the other. Equity and justice require that both should be

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heard in the matter, and that if no agreement can be effected, then, that the courts, with both parties before them, in due course of law, should adjust the dispute with due regard to the rights of each.

It is proper for courts to have regard to consequences in giving effect to statutes. They can not, to be sure, disregard the plain words of the statute, but it is nevertheless their duty, wherever it can be done without violence to the language employed, to so construe statutes as to give them a reasonable, just and beneficial effect. This doctrine has been repeatedly stated by the highest of the national courts, and has been acted upon by our own court. *United States v. Kirby*, 7 Wall. 482; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Rodman v. Reynolds*, 114 Ind. 148; *Humphries v. Davis*, 100 Ind. 274.

The doctrine is, as every one knows, much older than any American court. *Broom Legal Maxims*, 184; *Ram Legal Judgments*, 113.

We do not, of course, assert that the judiciary will determine matters of policy or expediency, for we broadly concede that those are purely legislative questions; but we do assert that the judiciary will, where it can be done without departing from the words of a statute, give the statute such a construction as will avert evil or unjust results. Here, however, the language of the statute suggests and develops the policy which is obviously the just one, and we need do no more than give a fair and reasonable effect to those words.

It appears from the record that the appellant was called upon to agree as to the matter of compensation only, and that the course pursued was such as not to bring forward for consideration the two other elements involved—the place of crossing and the manner of crossing—but to exclude them.

The position of the appellee, as indicated by the record and the method of pleading, was, that only the matter of compensation was to be agreed upon, and that the two other elements were not the subjects of negotiations and agreement.

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No other effect can be attributed to the allegations as they appear of record, since they confined, as far as it was in appellee's power, the questions to the single one of compensation, thus, impliedly, at least, affirming that the others were not the subject of negotiation. As it required the appellant to negotiate upon one only of three questions, it did not make such an effort to secure an agreement as the law requires. The appellant was not bound to enter upon negotiations on a false basis, and by restricting the negotiations to a single question, the appellee wrongfully endeavored to draw it into negotiations upon a false basis, thus disobeying the law and rendering the proceedings ineffective.

The conclusion which we have reached is, in our judgment, maintainable on reason without the aid of authorities, but authorities are not wanting. The rule we approve is thus stated by Mr. Lewis: "Statutes conferring the power of eminent domain usually require that an attempt shall be made to agree with the owner of property desired, before instituting proceedings to condemn it. In whatever form of words this direction is couched, it is generally held to be imperative, and a condition precedent to the exercise of compulsory powers. It is generally held that the inability to agree should be alleged and proven." Lewis Eminent Domain, section 301. Very many cases are collected and cited in support of the text. We are aware of the decision in *Swinney v. Fort Wayne, etc., R. R. Co.*, 59 Ind. 205, that it is not necessary for a railroad company seeking to appropriate land to precede its application to condemn by an offer to purchase, but conceding for the present the soundness of that decision, and postponing the examination of it until we dispose of the point under immediate mention, we affirm that it has no application to this point, and that is sufficient at this place except, perhaps, that we ought to give our reason for denying its relevancy, and that we do by affirming that the statute which rules this point does imperatively require that there shall be a precedent effort to adjust the dis-

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puted questions by an agreement. We know, too, that in *Ney v. Swinney*, 36 Ind. 454, it was decided that the fact that there was a precedent effort to secure an agreement was not a jurisdictional one, and without now questioning the correctness of that ruling, we dispose of the case as we did *Swinney v. Fort Wayne, etc., R. R. Co., supra*, by denying its relevancy. We may with strict propriety add another reason and that is this: In the case cited the question came before the court in a collateral proceeding, while here it is presented by an appropriate direct attack; so that, here, the question is not entirely one of jurisdiction as in *Ney v. Swinney, supra*, it certainly was. The authorities, with little, if any, conflict, sustain us in affirming, as we have done, that it must be affirmatively shown that an effort was made to secure such an agreement as the statute requires. It is not enough to show, even by direct averment, that there was an effort to obtain some agreement, but it must be shown that the effort was to obtain the agreement which the statute prescribes. The statute of New York is the same as ours, and the rule which prevails there is thus stated in one case:

"The petitioner had no right to resort to the court, *until a failure to agree* as to the matter specified. Such failure was a condition precedent to any standing in court; and there could be no failure or inability to agree, within the meaning of the statute, until some efforts to agree had in good faith been made." *Matter of Lockport and Buffalo R. R. Co.*, 77 N. Y. 557-563.

In another case it was said: "It is a fatal objection to the order in these proceedings, so far as the rights of the Troy and Bennington Railroad are involved, that the petition does not show that any attempt was made to agree with that company as to the points or manner of crossing its road or the compensation to be made therefor. This is a jurisdictional fact. The attempt and failure to agree is a condition precedent to the authority of the court to appoint commissioners, and unless this is averred in the petition, there is no juris-

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diction." *In re Hoosac Tunnel and Western R. W. Co.*, 79 N. Y. 69.

Another case also contains this statement: "The very purpose of providing for the appointment of these commissioners is to determine, in case of dispute, at what points the crossings shall be made, and in what manner, and it is the obvious duty of these commissioners to see that the crossings are not made in such a manner, or at such points, as to unnecessarily interfere with the operation of the road to be crossed." *Matter of Boston, etc., R. W. Co.*, 79 N. Y. 64.

The decided cases go further than we are required to do here, for they hold that the failure to agree must appear in order to give jurisdiction. The rule is thus stated by a text-writer: "The record of the preliminary proceedings should affirmatively show a failure to agree. The refusal of the owner is a jurisdictional fact, and is not to be eked out by extraneous evidence." *Mills Eminent Domain*, section 107. We do not deem it necessary to cite the cases, and content ourselves with affirming that they are very numerous, and are unusually harmonious.

We can not assent to the proposition of appellee's counsel that the instrument of appropriation sufficiently avers that there was an effort to agree as to the point and manner of crossing. What is averred as to compensation can not justly be held to be well alleged, since it seems to us that it is stated only by way of recital; but, for the present, waiving this point, and granting that the allegation is not simply a recital, we are compelled to hold that there is no sufficient averment at all upon any other question except that of compensation. Counsel say: "By the word 'terms' we meant the conditions upon which such crossing might be had, referring to those not only of point and of place, but to the conditions also that must be included in the word 'manner,' as used in the statute."

We have given the subject much study, and have endeavored to give the pleading the construction for which coun-

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sel contend, but this we can not do. The word "terms" can not be extended as counsel insist. Certainly it can not be construed to mean place of crossing, nor do we think it can be construed to mean the manner of constructing the crossing. In strictness, the word "terms" refers only to the compensation, for this is the fair construction of the whole averment. It reads—and we repeat it for the sake of clearness—"And having attempted and failed, and being unable to agree with the respondent in regard to the terms of, or in regard to the compensation therefor, do now, by these presents, under and pursuant to the provisions and requirement of the act of the General Assembly, take and appropriate an easement in and the right to use the lands and premises held by the respondent as aforesaid, for the purpose of constructing, owning and operating in perpetuity its, the said petitioner's, railway over, across and upon the same."

It is manifest that the word "terms" can not be so stretched as to include the three things—compensation, place of crossing and the mode or manner of crossing—without doing violence to the word, and to those words with which it is associated. At all events, there is not that directness and definiteness in averring the material and indispensable facts which the law requires.

As we have already said, the question here is not solely one of jurisdiction, for here we have a direct attack, and the sufficiency of a pleading appropriately questioned. We are, therefore, confronted with the questions whether sufficient facts are pleaded, and whether they are well averred. The questions before us can not, it is clear, be disposed of by asserting that they are not jurisdictional. If it should be conceded that they were not jurisdictional, we should still be compelled to decide whether facts sufficient were well pleaded. The case of *Borland v. Mississippi, etc., R. R. Co.*, 8 Iowa 148, may consequently be conceded to be well decided, and yet be justly declared to be not of governing or even of per-

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suasive force. Its relevancy, on the contrary, must be explicitly denied.

It is not to be forgotten that in directly assailing a pleading, only such facts as are sufficiently pleaded are admitted. A fact not well pleaded adds no strength to the pleading. This is proved by the authorities cited, and results from an old rule which has for ages passed unchallenged.

We agree with the appellee's counsel that the inability to agree is the thing required ; but we must add to their proposition that the thing required is the inability to agree upon the three things named in the statute. The agreement, if successful, or, if unsuccessful, the effort to agree, must extend to all of the material things of which the statute makes mention. Counsel cite us to *Williams v. Hartford, etc., R. R. Co.*, 13 Conn. 397, *Tucker v. Erie, etc., R. R. Co.*, 27 Pa. St. 281, *Mississippi, etc., R. R. Co. v. Rosseau*, 8 Iowa, 373, *United States v. Reed*, 56 Mo. 565, *Booker v. Venice, etc., R. W. Co.*, 101 Ill. 333, *Mills Eminent Domain*, sections 108, 109, *Pierce Railroads*, 181, 182. But we do not regard these authorities as decisive of the question ; indeed, we do not think they meet the question as it comes to us.

We have not gone counter to them, for we agree with them in the main, and hold that all that is required is the fact of the inability to agree ; but where we differ from the counsel is in holding that the inability to agree is not sufficient unless it appears that the effort to secure an agreement extended to all of the things specified by the law, and that it must be well pleaded. To be well pleaded the facts must be so averred that a definite issue can be evolved. It is here that the views of court and counsel diverge, and it is because they thus diverge that the authorities cited do not control our judgment. They are not broad enough to meet the whole question, but leave much of it, and a material part of it, utterly unsupported.

There may, we doubt not, be a waiver of an agreement, or of an effort to agree, but where there is a waiver that fact

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should be directly alleged. This, certainly, is in accordance with the long and well settled rules which prevail in ordinary cases. But, passing, without deciding, this precise question, we hold that where objections are seasonably and appropriately made there can be no waiver. So the objections were made in this case. We can not conceive how there can be a waiver where an objection is appropriately made at the earliest opportunity to a petition or to an instrument of appropriation. We do not believe that the waiver of a material right in the nature of a condition can not be presumed or inferred. Neither do we believe that an appeal which invokes the powers of the court is, of itself, a waiver of any valid objection to the proceedings. If it were so, then, in no case where an appeal is taken, would there ever be any other question open to investigation than that of compensation. It is our conviction that the law never meant to thus limit the judicial investigation invoked by the appeal. Parties, doubtless, may limit it, but it is not to be presumed that they have done so in the absence of facts creating the presumption.

The language used by Mr. Mills, in the section counsel refer to, is not entirely accurate, but his meaning is not that attributed to him by counsel, for it is quite apparent that he refers to cases where the record shows that the only point in issue was that of compensation. *Mills Eminent Domain*, section 109. So far as concerns the waiver of all efforts to agree, it is clear that this author refers only to cases where the record shows that there was a waiver. *Mills Eminent Domain*, section 108.

Counsel have argued a question of much more importance and difficulty than those we have decided, and that question is whether, upon a proper instrument of appropriation, a junior corporation can condemn part of the right of way of an existing railroad company, and by this means acquire a longitudinal part of the right of way. On the one hand, it is affirmed that subdivision five of section 3903, R. S. 1881, confers the power to condemn; while, on the other,

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it is contended with earnestness, and with no little plausibility, that the statute confers authority to condemn only for the purpose of intersecting, connecting or crossing. Both sides agree that property once appropriated can not be again condemned unless the statute confers that power, but the appellee's counsel vigorously and ably argue that the statute does confer this power, and that, under it, part of a right of way of the older corporation may be condemned and a line of road laid parallel with the existing track. We have not decided this question for the reason that, in our judgment, we first encounter a question which is decisive of this appeal. We think it not inappropriate, however, to cite the authorities which are at hand, for the question is one that will probably require decision in some other case. *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486; *Hickok v. Hine*, 23 Ohio St. 523; *Appeal of Pittsburgh Junction R. R. Co.*, 17 Pitts. Leg. J. 95; *Illinois, etc., R. R. Co. v. Chicago, etc., R. R. Co.*, 30 Am. & Eng. R. R. Cases, 287; *Denver, etc., R. R. Co. v. Denver, etc., R. R. Co.*, 14 Am. & Eng. R. R. Cases, 83; *Duncan v. Pennsylvania R. R. Co.*, 94 Pa. St. 435; *Matter of Boston, etc., R. R. Co.*, 53 N. Y. 574; *State v. Montclair R. W. Co.*, 35 N. J. L. 328; *Alexandria, etc., R. W. Co. v. Alexandria, etc., R. R. Co.*, 75 Va. 780 (40 Am. Rep. 743, and note); *Boston, etc., Railroad v. Lowell, etc., Railroad*, 124 Mass. 368; *Contra Costa, etc., R. R. Co. v. Moss*, 23 Cal. 323; *Thomas v. Railroad Co.*, 101 U. S. 71; *City of Clinton v. Cedar Rapids, etc., Railroad Co.*, 24 Iowa, 455; *Attorney General v. Ely, etc., R. W. Co.*, L. R. 4 Ch. App. 194.

The gravity and importance of the question is such that we have concluded that it should only be decided in a case where it is indispensably necessary to a proper and adequate judgment. We do not, as we have indicated, believe this is such a case, for we think that our decision upon a point which precedes the one mentioned fully and properly disposes of this appeal. We believe our duty is done when

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we fully meet and decide a question which leads to a reversal without investigating and deciding questions which lie beyond. Where a material question first in point of priority is decided, all the questions that the record legitimately brings to us are disposed of within the meaning of section 5 of article 7 of our constitution. That provision can not mean that in cases of reversal every point must be decided, even though some one of them completely disposes of the case; nor does it mean that the court must write upon all questions, but that it must write on such only as are decided. This court has uniformly acted upon the rule that where there is a judgment of reversal, it will not consider all of the questions urged or presented, except in cases where it is clear that they will arise on a new trial, and even then the questions are not decided because it is the duty of the court to decide them, but because it is best to do so as a matter of expediency. We doubt whether a single volume of our reports can be found, from the time our constitution went into effect until the present, which does not contain cases in which this rule was acted upon by the court. Questions which come after a pivotal one that controls the case, and the decision of which completely disposes of the appeal, can not, as a general rule, be accurately said to be presented by the record in cases of reversal, although there may be, and perhaps are, exceptional cases. If it were otherwise the court might often and often be required to go far beyond the decision of a question which disposes, adequately and properly, of a pending appeal, and we think it evident that only such questions as must be decided in order to justly and completely dispose of the case before the court, can be said to be "questions arising in the record," and questions upon which the court must write. If, to sum up in a short way, the court decides all the questions essential to a full and effectual disposition of the case at its bar and writes on those questions, it has done its full duty under the constitu-

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tion. *Trayser v. The Trustees, etc.*, 39 Ind. 556; *Willets v. Ridgway*, 9 Ind. 367.

We do not deem it necessary to a final disposition of this appeal to decide whether a junior corporation can in any event seize the right of way of a senior corporation, for the reason that we are satisfied that, conceding that the power to appropriate does exist in the junior corporation, that power can not be exercised until after there has been a fruitless effort to come to an agreement. There must, in our judgment, be an attempt to agree, and this, if not strictly a jurisdictional matter, is, at least, a condition precedent to the exercise of the power to appropriate.

We are inclined to the opinion that subdivisions five and six of section 3903, R. S. 1881, must be construed together, and that they must be regarded as containing the only grant of power to one railroad corporation to seize the property of another that is used for railroad purposes, no matter what may be the character of the property seized or the rights acquired. *Illinois, etc., R. R. Co. v. Chicago, etc., R. R. Co.*, 30 Am. & Eng. R. R. Cases, 287.

Those subdivisions read thus:

"*Fifth.* To construct its road upon or across any stream of water, watercourse, road, highway, railroad, or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises.

"*Sixth.* To cross, intersect, join, and unite its railroad with any other railroad before constructed, at any point on its route and upon the grounds of such other railroad company, with the necessary turn-outs, sidings, switches, and other conveniences, in furtherance of the objects of its connections; and every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with

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the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations can not agree upon the amount of compensation to be made therefor, or the points or manner of such crossings and connections, the same shall be ascertained and determined by commissioners, to be appointed as is provided hereinafter in respect to the taking of lands; but this section is not to affect the rights or franchises heretofore granted."

We do not, however, decide this question, for we think that if the provisions of the statute which refer to the seizure of lands or property owned by individual citizens be alone considered, still the result must be adverse to the appellee and decisive of this appeal. It is obvious that if the construction suggested be the correct one, then the provisions as to the agreement relate to the longitudinal strip as well as to the crossing, and the last clause of sub-section six applies only to proceedings subsequent to the effort to agree.

It is our judgment, reached after full deliberation and careful study, that a railroad corporation can not acquire the property of a citizen, or of another railroad corporation, without having first endeavored to secure it by agreement. This is so, even though the statute applicable to the acquisition of property from individuals be alone considered as supplying the governing rule, and more clearly it is so, if possible, where the provisions of the statute we have copied (sub-sections five and six) are taken as furnishing the rule of decision, since it is evident from what we have said that an agreement, or an effort to secure an agreement, upon the three matters designated is a condition precedent in all cases where there are no facts constituting a waiver. Many of the arguments and many of the authorities we have already adduced support and confirm our conclusion.

We are at this point necessarily required to examine with care the case of *Swinney v. Fort Wayne, etc., R. R. Co.*, *supra*.

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Our duty is the less delicate for the reason that the court has already declared its disapproval of the decision in that case. This was its declaration in the case of *Terre Haute, etc., R. R. Co. v. Scott*, 74 Ind. 29. The opinion in *Swinney v. Fort Wayne, etc., Co.*, *supra*, upon the point here under immediate discussion, was not, it is evident, very carefully considered, for all that was said is this: "We think the court did not err in rejecting the first exception to the award. It is not necessary that the appellee should have offered to purchase the land before commencing the proceedings to appropriate it. There are decisions in other States, however, which hold such an exception good; but, upon examination, we find that they rest upon statutes which allow the appropriation to be made by a legal proceeding only upon the refusal of the land-owner to convey upon application of the company desiring to obtain the lands." It is impossible for us to resist the conviction that the court did not accurately construe our statute. We are forced to the conclusion that the Legislature intended to require that an effort should first be made to procure the property by agreement. This intention is manifested by appropriate words, and is evident from an inspection of the entire statute. It is, as we adjudge, clearly manifested in several clauses of section 3907, one of which reads as follows: "If the corporation shall not agree with the owner of the land, or with his guardian, if the owner be incapable of contracting, touching the damages sustained by such appropriation, such corporation shall deliver to such owner or guardian, if within the county, a copy of such instrument of appropriation." We can perceive no reason for affirming that this clause in itself does not imply that before seizure there must be some effort to secure the property by agreement. The thing to be first done is to secure the property by contract, and, then, if this effort is unavailing, proceed to acquire the property by condemnation. We believe, also, that the court in the case we are criticising overlooked the policy which our Legislature, influenced, it is

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just to presume, by the legislation of other States, intended to establish. More remains to be said on this point, and that, in brief, is this: The general policy of the law is not to take by force of law that which may be acquired by contract. It is no more than just that a property owner should be given an opportunity to sell his property, or refuse to sell it, before asking the aid of the law to take it from him. It is, it needs no argument to demonstrate, bare justice to award a property owner an opportunity to reject or accept before forcing him, by legal proceedings, to give up his property. If, without doing violence to the words of the statute, a wise and just policy can be established, it is the duty of the courts to so interpret the statute as to establish that policy. A construction which will overturn a salutary policy or work injustice is, if possible, to be avoided. Mr. Bishop says: "The interpretation should lean strongly to avoid absurd consequences, injustice, and even great inconvenience; for the legislative meaning is to be carried out, and it can not be supposed to be any of these." Written Laws, section 82.

We regard it as clear that the Legislature did not mean to take by force of law the property of a citizen or corporation and bestow it upon another, without first giving him an opportunity to part with it by agreement, or to refuse to part with it. The power of eminent domain, guarded as carefully as it can be, is a very high and dangerous one, and no restriction which tends to the better protection of the owner whose property is taken against his will, should be swept away by the courts, except in cases where the language of the statute is so clear as to leave nothing for the courts to do but give effect to its very words. We do not mean, of course, that courts can substitute their judgment for that of the Legislature, or that they can disregard the words of the statute; we are very far, indeed, from sanctioning any such doctrine, for we have again and again declared that the courts can not determine questions of expediency or policy, but we do mean that where the meaning of the statute is

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not clear the courts will so construe it as to promote equity and justice. No equitable considerations alone can, we affirm, authorize a court to disregard the language of an unambiguous statute; but equitable considerations, where they may be presumed to have influenced legislative action, and where the words are not clear, are entitled to high consideration from the courts, since it can not be presumed that the Legislature intended to violate the principles of natural justice. If there is doubt it will be resolved in favor of the presumption that the Legislature meant to do equity. Natural equity will not control the words of a statute where there is no uncertainty. However evil may be the results which will flow from an adherence to the words, no departure is possible where there is certainty; but where there is doubt that construction will be adopted which will prevent injustice.

We accept as substantially an accurate statement of the general rule, what is said in a recent work: "If the words of a statute, though capable of an interpretation which would work manifest injustice, can possibly, within the bounds of grammatical construction and reasonable interpretation, be otherwise construed, the court ought not to attribute to the Legislature an intention to do what is a clear, manifest and gross injustice. On the contrary, the presumption always is, where the design of an act is not plainly apparent, that the Legislature intended the most reasonable and beneficial interpretation to be placed upon it. It is obvious that the administration of justice requires something more than the mere application of the letter of the law." Endlich Stat., section 253.

It is consistent with justice, and in harmony with the presumed intention of the Legislature, to hold, as we do, that it was the purpose of this statute to afford the property owner, whether an artificial or a natural person, the opportunity of disposing of his or its own property by agreement, or of declining to do so before a taking against the owner's will by force of law. It is, indeed, implied in the very fact

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that the law must ultimately be resorted to that it is taken without the owner's consent, but before resort is had to the law, the owner should be heard to decline or agree to part with the property by contract.

The decisions in the class of cases to which the case at bar and the one we are criticising belong, strikingly illustrate and enforce the rule we sanction, for it is universally held that, in favor of the property-owner, the construction is liberal, but strict as against the corporation that asserts a right to appropriate his property. "An act of this sort," said the court, in *Binney's Case*, 2 Bland's Ch. 99, "deserves no favor; to construe it liberally would be sinning against the rights of property." We are thus led to the conclusion that the court in *Swinney v. Fort Wayne, etc., R. R. Co.*, *supra*, not only so construed the statute as to make it hostile to the general policy of the law, but that it also acted upon a wrong theory, since it construed the statute strictly against the property-owner, and liberally in favor of the person seeking to take his property from him.

We can not comment upon the numerous cases we have examined, but must be content with asserting that the general rule deducible from them is, that, whatever the form of the words employed, a direction that there shall be an effort to purchase the property or an effort to procure an agreement, the provision will be deemed mandatory, and that the appropriation proceedings will fail unless the statutory requirement is obeyed by making the proper effort before prosecuting proceedings to condemn. *Stone v. Commercial R. W. Co.*, 4 Mylne & C. 122; *Bowman v. Venice, etc., R. W. Co.*, 102 Ill. 459; *Chicago, etc., R. R. Co. v. Sanford*, 23 Mich. 418; *Cunningham v. Pacific Railroad*, 61 Mo. 33; *Hannibal, etc., R. R. Co. v. Muder*, 49 Mo. 165; *Matter of New York, etc., R. R. Co.*, 67 Barb. 426; *Pierce R. R.* 181, and cases cited in note; *Lewis Eminent Domain*, section 301, and authorities collected in notes 1 and 2.

We are constrained by the considerations we have ex-

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pressed, and the authorities we have examined, to deny the authority of *Swinney v. Fort Wayne, etc., R. R. Co., supra*, upon the point we have discussed, and to acquiesce in the disapproval expressed in the case of *Terre Haute, etc., R. R. Co. v. Scott, supra*.

The instrument of appropriation is the foundation of the entire proceeding. If it be not a sound foundation no valid proceeding can be built upon it. A sufficient foundation it can not be, unless it states all facts essential to the right of the corporation to make the seizure. If it fails to do this, it does not state a case authorizing the court to proceed in the matter.

In *Church v. Grand Rapids, etc., R. R. Co.*, 70 Ind. 161, a case of the same general class to which the present belongs, it was held that the petition must state all facts essential to the right of the court to assume authority over the proceedings, and it was said that "objection may be taken as in ordinary adversary proceedings." The court said in another case of the same general nature (54 Ind. 121), that "Appellee did not charge, except inferentially, that appellant had taken any of his real estate," and this was held to be a fatal defect. It was also held in that case that a failure to give a correct description of the property taken, and to refer to the statute which authorized the taking of the land, were defects of such a nature as rendered the petition bad. We do not assert that these cases are directly in point, but we do assert that they bear strongly upon the general proposition, that in all cases the petition, or the instrument of appropriation, must contain all such facts as are requisite to the authority of the court to proceed in the matter. It is not to be forgotten that the case is not one dependent upon general statutes or general rules of law, but upon a statute affecting the rights of a class and prescribing particular rules of procedure. Proceedings under such statutes are not ordinary civil actions, but are statutory proceedings of a special na-

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ture. *Anderson v. Caldwell*, 91 Ind. 451, and cases cited; *Toledo, etc., R. W. Co. v. Dunlap*, 47 Mich. 456.

These special proceedings may be in a general sense civil actions, but they are, nevertheless, proceedings of a peculiar nature and founded exclusively on a statute, for the right of eminent domain can only be exercised under a legislative enactment and in accordance with its provisions. Although, as to matters of practice and the like, the provisions of the civil code may be called to the aid of the special statute, the proceeding is not, in the strict sense, an ordinary civil action. As the proceeding is in its nature a special statutory one, it is incumbent on the party who takes the initiatory steps to make a case of which the court may rightfully assume jurisdiction. This must necessarily be so, for there is no inherent or general jurisdiction, but only the special and limited authority conferred by the statute. To call into exercise this limited and special jurisdiction, facts must be stated authorizing the court to take cognizance of the particular case, and where the question is presented by a direct attack the absence of these facts makes the instrument bad. It is generally held that the fact of inability to agree is a jurisdictional one, but our judgment is that it is a jurisdictional fact only in a qualified sense, for we believe that, as held in *Ney v. Swinney*, *supra*, the absence of the allegation that there was an effort to agree will not be sufficient cause for declaring the proceedings void in a collateral attack, although the objection, if seasonably and appropriately made, will be fatal in a direct proceeding.

We have many cases declaring that where there is some petition, although radically defective, or there is some notice, although insufficient, still, the court having passed upon the petition or notice, and adjudged that it possessed jurisdiction, that decision will make a collateral attack unavailing. *Mullikin v. City of Bloomington*, 72 Ind. 161; *Hume v. Conduitt*, 76 Ind. 598; *Ricketts v. Spraker*, 77 Ind. 371; *Hackett v. State*, 113 Ind. 532; *Kleyla v. Haskett*, 112 Ind. 515; *Adams*

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v. *Harrington*, 114 Ind. 66. The rule, however, is different where the sufficiency of a notice or pleading is directly questioned, and here we are dealing with a pleading directly, seasonably and appropriately assailed, and it must, therefore, be held that if it is radically defective the attack should prevail.

Our ultimate conclusion is that, even if it be conceded that the authority exists to take longitudinally the appellant's right of way, still this appeal must be sustained because the instrument of appropriation does not sufficiently plead such facts as authorized the court to proceed in the matter, inasmuch as it does not positively aver that there was an effort to secure by agreement the rights demanded.

The construction given to the clause of section 3907 regarding the questions that may be tried on appeal, in *Swinney v. Fort Wayne, etc., R. R. Co.*, *supra*, we accept as the true one, and we hold, as it was there held, that the clause must be construed to mean "questions subsequent to the establishment of the regularity of the appraisement." Our conclusion, somewhat differently expressed, is this: The petition, or instrument of appropriation, must, where the attack is a direct and not a collateral one, show the facts upon which the jurisdiction of the court to move in the case depends, and one of these facts is the effort of the corporation seeking title to acquire it by agreement. This fact, in its nature jurisdictional, must be directly averred, otherwise the instrument does not constitute a sufficient foundation for subsequent proceedings, and is bad as against an attack directly, seasonably and appropriately made.

Our conclusions necessarily lead to a reversal, irrespective of the question of the right of one railroad company to acquire part of the right of way of an existing corporation.

Judgment reversed.

MITCHELL, J., did not participate in the decision of this case.

Filed Dec. 19, 1888; petition for a rehearing overruled March 5, 1889.

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5. *Insurance Policy.—Assignment.—Consideration.—Promise to Pay to Third Person.—Statute of Frauds.*—A promise, made in consideration of the assignment to the promisor of a life insurance policy, to pay to a third person a debt due from the assignor, is valid, and not within the statute of frauds. *Leake v. Ball, 214*
6. *Same.—Payment.—Time of Making.*—In the absence of an agreement that the debt is not to be paid until after the death of the insured, it is payable at once. *Ib.*
7. *Same.—Rescission.—Tender.*—The assignee of the policy can not avoid his promise to pay the stipulated consideration without returning or tendering the policy. *Ib.*
8. *Same.—Contract Must be Repudiated as a Whole.*—A contract can not be affirmed in part and rejected in part; it must be repudiated totally or not at all. *Ib.*

CONTRIBUTORY NEGLIGENCE.

See MUNICIPAL CORPORATION, 10; NEGLIGENCE; RAILROAD, 4, 9, 22, 23.

CONVERSION.

See HUSBAND AND WIFE, 1.

Action.—Demand.—Where one appropriates the money or property of another, without the knowledge or consent of the latter, the appropriation is wrongful, and an action may be maintained for its recovery without averring or proving a demand. *Armacost v. Lindley, 295*

CONVEYANCE.

See DEED; FRAUDULENT CONVEYANCE; MORTGAGE; NEW TRIAL, 1; PARTNERSHIP, 2, 3, 4; RAILROAD, 20, 21; REAL ESTATE; WILL, 5.

CORPORATION.

See HIGHWAY; INSURANCE; TELEGRAPH COMPANY.

Forfeiture of Franchise.—Judicial Declaration.—The fact that a corporation has been guilty of a breach of duty constituting a cause for forfeiture of its franchise, can not be taken advantage of in a private action, nor by entering upon the corporate property, as forfeiture can only be judicially declared and in the manner prescribed by law.

Western P. R. Co. v. Cent. U. Tel. Co., 229

COUNTY.

See NEGLIGENCE, 4.

1. *Negligence.—Failure to Keep Bridges in Repair.*—Counties are liable for damages resulting from a negligent failure on their part to keep bridges on public highways in repair, without regard to the cost of the repairs.
Board, etc., v. Arnett, 438
2. *Same.—Cost of Repairs.—Duty of Township Trustee.*—The duty imposed by section 2892, R. S. 1881, upon county commissioners to keep bridges in repair, and the liability resulting from a breach thereof, are not affected by the act of 1885, making it the duty of township trustees to make repairs when the cost is less than seventy-five dollars. *Ib.*
3. *Same.—Presenting Claim to Board of Commissioners.—Jurisdiction.*—It is not necessary that the plaintiff in an action against a county shall prove that he filed his claim before the board of commissioners prior to bringing the action in the circuit court. *Ib.*
4. *Same.—Damages.—Elements of.*—The amount of money judiciously expended by a plaintiff, and the fair value of his personal services, in endeavoring to cure a horse injured by a defective bridge, are proper elements of damages in an action against the county. *Ib.*

COUNTY CLERK.

See DEPOSITION, 2.

COUNTY COMMISSIONERS.

See COUNTY; DRAINAGE, 7, 11; OFFICE AND OFFICER, 1, 2; SCHOOLS.

COUNTY SUPERINTENDENT.

1. *Election by Trustees.—Trustee Can Not Vote for Himself.*—The election of the county superintendent of schools being vested by law in the township trustees, one of such trustees can not legally vote for himself for that office, and a vote so cast can not be counted in determining the result of the election.
Hornung v. State, ex rel., 458
2. *Same.—Failure to Object.—Implied or Informal Vote.*—A failure of the trustees voting for other candidates to make further objection after the presiding trustee had declared the result of the election, can not be held to be either an implied or informal vote in favor of the officer who voted for himself. *Ib.*

COVERTURE.

See MARRIED WOMAN.

CRIMINAL LAW.

See INTOXICATING LIQUOR; MALICIOUS PROSECUTION; RECOGNIZANCE; TAXES.

1. *Supreme Court.—Appeal by State.—Record.—Bill of Exceptions.*—On an appeal by the State in a criminal cause, whatever is a part of the rec-

ord without a bill of exceptions need not be embraced in such bill, and where the question of law reserved is shown by the record proper, no bill of exceptions is necessary. *State v. Vanderbilt, 11*

2. *Same.—Teacher and Pupil.—Rules for Government of School.—Unreasonable Rule.*—A rule established by the teacher of a public school, requiring pupils to pay for the wanton and careless destruction of school property is unreasonable, and a teacher has no right to enforce such a rule by chastisement. *1b.*
3. *Elections.—Voting More than Once.—Indictment.—Mistake in Charging Time of Commission of Offence.*—An indictment returned November 3d, 1886, charged that the defendant, on November 4th, 1886, the same being the day upon which the general election was held in Indiana for Governor, etc., as required by law, voted more than once, by intentionally handing to the inspector two ballots at the same time and place, which ballots were placed in the ballot box by the inspector.
Held, that judicial notice will be taken that there was no election on November 4th, 1886, but that there was an election for Governor on November 4th, 1884, less than two years prior to the return of the indictment.
Held, also, that the indictment shows that it relates to a past transaction, and that as the averments are repugnant and time not of the essence of the offence, the imperfection in stating the time is not cause for quashing the indictment.
Held, also, that the indictment sufficiently charges a violation of the statute against voting more than once. *State v. Patterson, 45*
4. *Return of Indictment.—Amendment of Record.—Plea in Abatement.*—Where the record does not show the return of an indictment into court it may be corrected by an entry *nunc pro tunc*, and a plea in abatement previously filed may then be overruled, the correction relating back to the time and being evidence of the return of the indictment. *Waterman v. State, 51*
5. *Same.—Misconduct of Bailiff.—Setting Aside Verdict.*—Misconduct on the part of a bailiff or other person connected with a trial, which is known to and acquiesced in without objection by a party or his counsel, can not afterwards be made available as a ground for setting aside a verdict, even though it be of a character which would otherwise vitiate the verdict. *1b.*
6. *Same.—Embezzlement.—Ownership.—Consignee.*—A consignee has such a qualified ownership in the property consigned as will sustain a charge for the embezzlement of the property from the consignee as owner. *1b.*
7. *Same.—Requisition.—Jurisdiction.*—Where an accused is returned to this State, upon a requisition, to answer a charge of embezzling money, he may be tried upon an indictment charging the embezzlement of property. *1b.*
8. *Reform School for Boys.—Act of 1883.—Title Sufficient to Embrace Subject-Matter.*—The title of the act of 1883 (Acts of 1883, p. 19), changing the name of the House of Refuge, etc., is sufficiently comprehensive to embrace section 9 of the act, which provides for the commitment of boys to the "Indiana Reform School for Boys." *Jarrard v. State, 98*
9. *Same.—Legislature May Provide for Reformation of Boys.*—The Legislature has power to provide for the reformation of boys who are entering upon a career of vice, by prescribing measures for committing them to a reformatory institution. Const., sec. 2, art. 9. *1b.*
10. *Same.—Commitment.—Method of Procedure Lawful.*—The act of 1883 provides a method for ascertaining by a judicial investigation, in a court of general superior jurisdiction, whether there is cause for taking boys

from their parents and placing them in the reform school, and, therefore, it is not an arbitrary proceeding. *Ib.*

11. *Same.—Complaint.—Sufficiency of Facts.*—A complaint by a guardian showing that he can not, because of his advanced age, exercise the control necessary to prevent his ward from becoming an evil member of society, and alleging that the ward is vicious and that he associates late at night with immoral, drunken and dissolute persons, at his own pleasure, is good. *Ib.*
12. *Medicine and Surgery.—License to Practice.—Misdemeanor.—Indictment.*—An indictment charging the defendant with practicing medicine without a license, contrary to the act of March 11th, 1885 (Acts of 1885, p. 197), is sufficient as against a motion to quash if it states the offence in the language of the statute, or in terms substantially equivalent thereto. *Benham v. State, 112*
13. *Same.—Burden of Proof.*—In a prosecution under the statute mentioned, the burden is upon the defendant to prove that he was duly licensed to practice medicine. *Ib.*
14. *Same.—Holding Out to World as Physician.—Treatment of "Opium Habit."*—One who styles himself a doctor and holds himself out to the world as a physician, and advertises that he treats and cures persons afflicted with the "opium habit," is required to obtain a license under the act regulating the practice of medicine and surgery, without regard to whether the "opium habit" is a disease or a vice. *Ib.*
15. *New Trial.—Certain Causes for to be Sustained by Affidavit.*—"Newly discovered evidence" and "accident and surprise," when assigned as causes for a new trial in a criminal case, must be sustained by affidavit showing their truth, the same as when assigned in a civil case. *McClure v. State, 169*
16. *Same.—Affidavits.—Making Part of Record.—Bill of Exceptions.*—Where there is no reference in the motion for a new trial to any affidavits in support thereof, and affidavits are not filed until after the filing of the motion, they do not constitute a part of the record on appeal to the Supreme Court unless they are made such by a bill of exceptions or by an order of the trial court. *Ib.*
17. *Same.—Error Must be Affirmatively Shown.—Presumption.*—Unless the record affirmatively shows that a ruling of the trial court was erroneous, it will be presumed that it was right. *Ib.*
18. *Witness.—Contradictory Statements.—Impeachment.*—A witness can be impeached by statements made out of court only when such statements are contradictory of his testimony. *Wagner v. State, 181*
19. *Same.—Reconcilable Statements.*—A statement out of court that at the time he shot the witness the accused "was crazed from the use of liquor, and from the trouble on his mind," is not necessarily contradictory of a statement in court that the accused was sober when he did the shooting. *Ib.*
20. *Same.—Intoxication.—Insanity.—Delirium Tremens.—Instructions to Jury.*—Voluntary intoxication existing at the time a crime is committed is not available as an excuse or defence in a prosecution by the State. For instructions to the jury upon the subject of insanity and delirium tremens caused by the use of intoxicating liquor, see opinion. *Ib.*
21. *Same.—Medical Experts.—Opinions.—Instruction.—Province of Jury.*—An instruction that the opinions of medical experts are to be considered by the jury in connection with all the other evidence in the case; that they are not bound to act upon them to the exclusion of other testimony; and that, giving such opinions their proper weight, they are to determine for themselves, from the whole evidence, whether or not

- the defendant was of sound mind, is not erroneous as invading the province of the jury or discrediting the testimony of the experts. *Ib.*
22. *Perjury.—Judicial Proceeding.—Materiality of Matters Testified to.*—An indictment for perjury committed in a judicial proceeding must show the materiality of the matters testified to, either by a general averment or by setting out the facts. *State v. Cunningham, 209*
 23. *Same.—Proceedings Supplementary to Execution.—Examination of Debtor.*—The inquiry in proceedings supplementary to execution taken under section 815, R. S. 1881, is confined to property owned by the debtor in the county at the time of his examination, and perjury can not be predicated upon his testimony as to what he had previously owned. *Ib.*
 24. *Same.—Indictment.*—An indictment for perjury charging that the defendant, contrary to his testimony, owned valuable property at the time of his examination in proceedings supplementary to execution, is bad if it fails to state that the property, or a part of it, was subject to execution in the county in which he resided. *Ib.*
 25. *Adultery and Fornication.—Cohabitation.*—To cohabit with another in a state of adultery or fornication, within the meaning of section 1991, R. S. 1881, is for a man and woman to live together in the manner of husband and wife, for some period of time. *Jackson v. State, 464*
 26. *Same.—Evidence.*—To sustain an indictment under the section mentioned, the evidence must establish cohabitation, including one or more acts of sexual intercourse. The intercourse may be inferred from proven circumstances, which raise such a presumption of guilt as to leave no reasonable doubt in that respect in the minds of the jury. *Ib.*
 27. *Same.—Argument of Counsel.—Misconduct.*—In his closing address to the jury the prosecuting attorney used the following language: "Washington Jackson's wife is broken-hearted over his conduct in connection with this woman. I know what I am talking about. I have been to Greenfield, and heard the evidence before the grand jury, and I know what those people think about this case."
Held, that the language is improper, and the trial court having failed to instruct the jury to disregard it, the judgment of conviction must be reversed. *Ib.*
 28. *Indictment.—Variance.*—Where an indictment for the unlawful sale of intoxicating liquor charges that the sale was made to William Lankford, Jr., but the evidence proves that it was made to William H. Lankford, the variance is not fatal. *Ross v. State, 495*
 29. *Same.—Supreme Court.—Evidence.*—Where there is evidence in the record tending to support every material charge in such indictment, the Supreme Court will not interfere with the finding of the court below. *Ib.*
 30. *Same.—Intent.—Harmless Error.*—A defendant in a criminal case may testify to the intent with which the offence was committed, but when he has testified fully as to the intention, and the inquiry seeks to elicit an immaterial fact, it is not error for the court below to sustain an objection to a question as to his intention. *Ib.*
 31. *Kidnapping.—Indictment.*—An indictment for kidnapping, which charges an offence in the words of the statute or in words of equivalent meaning, is sufficient. *State v. Sutton, 527*
 32. *Same.—Statute Construed.*—The offence of kidnapping as defined by one branch of the statute, section 1915, R. S. 1881, is complete if the person is feloniously carried away from his residence, unless the act is done pursuant to some State or Federal law, and an arrest or an imprisonment not made pursuant to such laws constitutes the offence

under the other branches of the statute if either is made with the felonious intention of carrying the person from his residence. *Ib.*

DAMAGES.

See COUNTY, 4; FRAUD; FRAUDULENT CONVEYANCE; MALICIOUS PROSECUTION; MASTER AND SERVANT; NEGLIGENCE; RAILROAD, 8, 15, 24.

DECEDENTS' ESTATES.

See FAMILY SETTLEMENT; HUSBAND AND WIFE; REPLEVIN.

1. *Sale of Personalty.—Insufficient Security.—Administrator Liable on Bond.*—An administrator who negligently accepts promissory notes executed by insolvent persons, at a sale of his intestate's personal property, is liable under section 2303, R. S. 1881, on his bond for both principal and interest, but he is entitled to have the notes turned over to him.
Lindley v. State, ex rel., 235
2. *Claims.—Demand.*—Claims against an estate, even though they be such as ordinarily require a demand before suit, may be filed and prosecuted without making a demand.
Armacost v. Lindley, 295
3. *Widow.—Election to Take Under Will.—Promissory Note Given for Husband's Debt.—Consideration.*—A widow, who elects to take under her husband's will instead of under the law, takes the property devised to her subject to sale, if necessary for the payment of the husband's debts; and a note executed by her to secure the payment of a debt of her husband, which is a charge upon the property devised, is supported by a sufficient consideration, and may be enforced, notwithstanding subsequent proceedings releasing the widow from her election.
Kayser v. Hodopp, 428

DEED.

See MORTGAGE; NEW TRIAL, 1; PARTNERSHIP, 2, 3, 4; RAILROAD, 20, 21; REAL ESTATE; SHERIFF'S SALE, 10; WILL, 5.

1. *Grant of Income of Land.—Effect of.*—The general rule is, that the grant of the income of land carries an estate in the land itself.
Williams v. Owen, 70
2. *Same.—Life-Estate.—Deed Construed.*—A grantor conveyed and warranted to A., B. and C., "and Z. to have his support off of said farm during his lifetime," certain land. After the description was the following: "It is understood that rents and profits of this farm go to maintain my son, Z. At his death my grandchildren are to have the same in fee simple, after my death, as above stated."
Held, that Z. took a life-estate in the land. Ib.
3. *Condition Subsequent.—Forfeiture.—Demand.—Judgment.—Judicial Sale.—Injunction.—Waiver.—Estoppel.*—The owner of land conveyed it by a warranty deed which contained the condition that the grantee should pay the grantor fifty dollars on the 1st day of March of each year, during the latter's life, on his failure to do which for three consecutive years the grantor might revoke the conveyance and revert the title by repaying the amount received and by placing upon record in the recorder's office a written revocation. The grantee failed to comply with the condition, but while he held title a judgment was taken against him and the land levied upon and offered for sale thereunder. The grantor sets up the foregoing facts, alleges a revocation of the conveyance in the manner stipulated, and asks that the sale be enjoined.
Held, that the plaintiff, upon the facts stated in the complaint, is entitled to an injunction.

Held, also, that a demand upon the grantee for payment was not necessary, he being bound to tender performance of the condition on his part.

Held, also, that if the grantor waived performance, or became in any way estopped to assert a forfeiture, the facts must be made to appear by answer. *Royal v. Aultman & Taylor Co.*, 424

DELIVERY.

See PLEADING, 5.

DEMAND.

See CONVERSION; DECEDENTS' ESTATES, 2; DEED, 3; EVIDENCE, 2; FORMER ADJUDICATION; SHERIFF'S SALE, 10.

DEPOSITION.

1. *Producing Witness in Court.*—Where a deposition is properly taken, it may be read in evidence unless the witness is produced in court at the time the deposition is read. Section 425, R. S. 1881.
Louisville, etc., R. W. Co. v. Hubbard, 193
2. *Seal of Notary.—Clerk's Certificate.*—Where a notary public in a foreign State, taking a deposition, omitted his seal from the certificate, but the clerk of the county, by a proper certificate, attested to the official character and signature of the notary, there is no cause for suppressing the deposition.
Pape v. Wright, 503
3. *Same.—Notice.—Motion to Suppress.—Practice.*—Where a party accepts service of notice without objecting, he can not be heard in the Supreme Court to say that the notice was insufficient. If the notice is not sufficient to authorize the taking of the depositions of all the witnesses, there should be a motion to suppress the deposition not authorized, although the court may, without error, on a motion to suppress all, suppress the one improperly taken; but a party is entitled to this only as a matter of favor. *Ib.*

DESCENTS.

See HUSBAND AND WIFE, 2; REAL ESTATE.

DIVORCE.

1. *Fraud in Procuring Decree.—Annulment.*—Where a husband procures a petition for divorce to be filed in the name of his wife, without her knowledge, and he files an answer and a divorce is granted, the wife may, upon discovering the fraud after his death, and more than twenty years after the decree was granted, have the same annulled by a proper proceeding for that purpose. *Brown v. Grove*, 84
2. *Same.—Notice of Decree.*—The wife was not bound to know of the existence of the decree merely because it was of record. *Ib.*
3. *Same.—Witness.—Proceeding to Which Heirs are Parties.*—In the proceeding against the heirs of the deceased husband to annul the decree, the wife is a competent witness as to what she did or did not do concerning the petition in the divorce suit. *Ib.*

DRAINAGE.

1. *Assessment.—Lands in Another County.—Jurisdiction.*—The court of the county in which the petitioner for drainage resides and where the proceeding is commenced, has jurisdiction and authority to establish a ditch extending into another county, and to make assessments against lands situate in such other county. *Hudson v. Bunch*, 63
2. *Same.—Report of Commissioners.—Remonstrance.—Practice.*—In a remonstrance against the report of drainage commissioners it is not sufficient to use the general terms of the statute that "the report is not according to law," and such a remonstrance presents no issue for trial. The

particulars in which it is claimed that the report is in that respect defective must be specified. *Ib.*

3. *Assessment.—Injunction.*—In order that a suit to enjoin the collection of a drainage assessment may be maintained, it is not enough that the proceedings for the establishment of the drain may be irregular and voidable, but it must be made to appear that they are absolutely void. *Montgomery v. Wasem, 343*
4. *Same.—Notice.—Collateral Attack.*—A notice by publication, given under section 2 of the drainage act of 1875 (1 R. S. 1876, p. 428), although not exactly as the statute prescribes, yet affording some notice to the persons interested, will be deemed sufficient as against a collateral attack upon the judgment. *Ib.*
5. *Same.—Presumption as to Notice.*—Where there is an entry in the proceedings before the county commissioners in effect reciting that all the notices required by the statute had been given, it will be assumed, in the absence of a showing to the contrary, that the statute was fully complied with. *Ib.*
6. *Same.—Injunction.—Acquiescence.—Estoppel.*—A land-owner who stood by, with full knowledge and without objection, while a contractor expended his money in the construction of ditch allotments let to him in a proceeding instituted under the drainage act of 1875, can not, after the completion of the work and after the amount due therefor has been placed on the tax duplicate for collection, avail himself of a mere irregularity to enjoin the collection of the assessment. *Ib.*
7. *Same.—Act of 1875.—County Commissioners.—Right to Accept Work at Called Session.*—Under section 12 of the act of 1875, the county commissioners had power to accept at a called session the work performed by a contractor, and the acceptance is conclusive, as against a suit for an injunction by a land-owner against whom an allotment was made, upon the question of the completion of the work. *Ib.*
8. *Same.—Injunction.—Tender.—Offer to do Equity.*—An injunction to restrain the collection of an amount charged against land in favor of a contractor who performed work under the drainage act of 1875, which work was accepted by the proper officers as completed, will not lie where something is due the contractor, unless the money equitably due is tendered and brought into court, if the amount is known, or, if the amount is uncertain, an offer to do equity is made. *Ib.*
9. *Enforcement of Assessment.—Complaint.—Sufficiency of Petition in Drainage Proceeding.*—It is not necessary that a complaint to enforce a drainage assessment should aver that the persons named in the petition were land-owners at the time it was signed, as the judgment in the proceeding establishing the drain is conclusive as to the sufficiency of the petition. It is enough for the complaint to show the petition, notice and judgment thereon. It is also not necessary that the record should affirmatively show that assessments were made from time to time. *Johnson v State, 374*
10. *Parties.—Action in Rem.*—In all cases having the essential qualities of actions *in rem*, as a drainage proceeding, it is sufficient, in making any one a party defendant, to allege that he has, or claims to have, some interest in the property described in the complaint. *Otis v. De Boer, 531*
11. *Same.—Act of 1879.—Notice of Assessments.—Collateral Attack.*—In an action to collect assessments on lands for the construction of a ditch under the drainage law of 1879, where the notices of the assessments had been held sufficient by the proper county board, their decision is conclusive as against a collateral attack. *Ib.*

EASEMENT.

See HIGHWAY.

EJECTMENT.

See RAILROAD, 15.

ELECTION.

See DECEDENTS' ESTATES, 3; FRAUD, 1, 2, 5.

ELECTIONS.

See COUNTY SUPERINTENDENT; CRIMINAL LAW, 3.

EMBEZZLEMENT.

See CRIMINAL LAW, 6, 7.

EMINENT DOMAIN.

See RAILROAD, 25 to 29.

EQUITY.

See DRAINAGE, 8; PROMISSORY NOTE, 5, 6; SHERIFF'S SALE, 12; STATUTE, 3; TENANTS IN COMMON.

ESTOPPEL.

See DEED, 3; DRAINAGE, 6; EVIDENCE, 8; MARRIED WOMAN; MUNICIPAL CORPORATION, 3; RAILROAD, 15, 29; SHERIFF'S SALE, 2.

EVIDENCE.

See ARBITRATION AND AWARD; ATTORNEY AND CLIENT, 3; BILL OF EXCEPTIONS; CONTRACT, 3; CRIMINAL LAW, 18, 19, 21, 26, 28, 29; DEPOSITION; HUSBAND AND WIFE, 7; MALICIOUS PROSECUTION, 4; MORTGAGE, 3, 4; MUNICIPAL CORPORATION, 5; NEGLIGENCE, 8; NEW TRIAL, 2; PRACTICE, 5, 6; RAILROAD, 10, 11, 12, 18, 19; REPLEVIN; SUPREME COURT; VERDICT, 6 to 9; WITNESS.

1. *City.—Report of Committee.—Admission.*—In an action against a city to recover on a contract for professional services, the report of a committee of the common council, on the subject of the performance of such contract, which is in the nature of an admission that the council had notice of the contract, and that the plaintiff was proceeding under it, is admissible in evidence. *City of Logansport v. Dykeman, 15*
2. *Demand in Former Complaint.—Admission.*—The demand made in the complaint in a former action is competent as an admission, but it is not conclusive upon the plaintiff. *Louisville, etc., R. W. Co. v. Hubbard, 193*
3. *Insanity.—Non-Expert Witness.*—It is not necessary that the acquaintance of non-expert witnesses with a person whose mental condition is in question should be extensive or intimate; it is enough if the acquaintance is such as to enable the witness to form some opinion. *Johnson v. Culver, 278*
4. *Same.—Conduct and Declarations of Alleged Insane Person.*—It is proper for a witness to describe the conduct and to repeat the declarations of a person whose mental capacity is the subject of investigation. *Ib.*
5. *Same.—Value of Land.—Contract of Exchange.—Fraud.*—The value of land given in exchange for other property may be shown in a case where the contract of exchange was procured by fraud. *Ib.*
6. *Same.—Refreshing Memory.—Written Memorandum.*—A witness may refresh his memory by reference to a written memorandum made by himself, where many items of personal property are involved. *Ib.*
7. *Same.—Items of Account.—Entries Against Interest.*—Entries against the interest of the person by whom made are admissible for the purpose of showing items of account. *Ib.*

8. *Objection to.—Estoppel.*—A party who himself first resorts to evidence of doubtful competency can not afterwards object to evidence of the same kind when introduced by his adversary. *Hobbs v. Board, etc.*, 376
9. *Speed.—Opinion.*—A man who has managed hand-cars, or assisted in their management, may express an opinion as to the rate of speed at which a hand-car was moving on a specified occasion.
Evansville, etc., R. R. Co. v. Crist, 446
10. *Same.—Personal Injury.—Nature and Effect.—Expert Witness.*—A physician, speaking as an expert witness, may testify as to the effect of an injury; so, also, under proper allegations in the complaint, it is competent for the plaintiff to prove the nature and extent of the injury. *Ib.*
11. *Impeachment.—Character.*—Evidence impeaching the character and reputation of a witness at the time he left his former residence, the time being reasonably near the examination—about two months before—is admissible. *Pape v. Wright*, 502
12. *Objection.—Exception.*—The exclusion of testimony can only be made available by asking a pertinent question of a witness on the stand, and if objection is made, stating to the court what testimony the witness will give in answer to the question proposed, and, if the objection is sustained, reserving an exception. *Gipe v. Cummins*, 511
13. *Res Gestæ.—Declarations.*—Declarations of a decedent made within two minutes after the injury was sustained, while he remained in the presence of the train and the defective machinery causing the injury, are admissible as part of the *res gestæ*.
Louisville, etc., R. W. Co. v. Buck, 566

EXECUTION.

See PROCEEDINGS SUPPLEMENTARY TO EXECUTION; RECOGNIZANCE.

EXECUTORS AND ADMINISTRATORS.

See DECEDENTS' ESTATES; REPLEVIN.

EXEMPTION FROM EXECUTION.

See PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

EXPERT AND OPINION EVIDENCE.

See CRIMINAL LAW, 21; EVIDENCE, 9, 10; RAILROAD, 12.

FAMILY SETTLEMENT.

Decedent's Estate.—Claims.—Payment.—Where one devisee, who holds enforceable claims against the testator's estate, enters into a contract with another devisee, upon whose land the claims are a burden, in pursuance of which the latter pays to the former full consideration for the claims, the settlement is valid, in the absence of fraud or mistake, and the claims involved will be deemed extinguished.

Burkham v. Hayes, 136

FEES AND SALARIES.

See TOWNSHIP TRUSTEE, 2.

FENCE.

See RAILROAD, 13, 14.

FORECLOSURE.

See JUDGMENT, 15; MECHANIC'S LIEN; MORTGAGE.

FOREIGN CORPORATION.

See INSURANCE.

FORFEITURE.

See CORPORATION; DEED, 3; RECOGNIZANCE.

FORMER ADJUDICATION.

See JUDGMENT, 15; SCHOOLS, 2.

Title to Money.—Bank.—Demand.—Where a plaintiff brings an action asserting title to money deposited in bank and drawn by the defendant, and the latter, by an affirmative answer, asserts title in himself, and on that answer has judgment, there is an adjudication of the question of title which may be pleaded by the bank in bar of an action by the plaintiff against it, notwithstanding a demand had been made by the plaintiff upon the bank prior to the adjudication.

Glaze v. Citizens Nat'l Bank, 492

FORNICATION.

See CRIMINAL LAW, 25 to 27.

FRAUD.

See ATTORNEY AND CLIENT, 1, 2; DIVORCE; EVIDENCE, 5; FRAUDULENT CONVEYANCE; NEGLIGENCE, 1.

1. *Contract.—Rescission.—Damages.—Election as to Remedy.*—A person who is induced by the fraud of another to enter into a contract with the latter, may rescind the contract *in toto*, or he may affirm the contract and sue for the damages caused by the fraud. *Johnson v. Cutver*, 278
2. *Same.—Consideration.—Tender.—Insanity.*—In ordinary cases, not complicated by the element of insanity, the plaintiff who elects to rescind must tender back the consideration received; but if he elects to sue for damages no tender is required. *Ib.*
3. *Same.—Sale.—Measure of Damages.*—In an action by an administrator to recover the value of personal property obtained by the defendant under a fraudulent contract with the plaintiff's insane intestate, the measure of recovery is the loss actually sustained, *i. e.*, the value of the property less any consideration paid and retained. *Ib.*
4. *Same.—Promissory Note.—Payment.*—In estimating the amount of recovery it is proper, in the absence of a showing that it has not been paid, to allow the defendant credit for a promissory note executed by him and delivered to the payee in part payment for property purchased. *Ib.*
5. *Same.—Waiver of Right to Sue for Damages.*—To constitute a waiver of a right to sue for damages resulting from a contract procured by fraud, the party who sustains loss must act with a full knowledge of his rights and the material facts in the case, and clearly manifest his intention to abide by the contract and abandon any remedy he may have. *Ib.*

FRAUDULENT CONVEYANCE.

See ATTORNEY AND CLIENT, 1, 2; EVIDENCE, 5; FRAUD.

1. *Trust.—Innocent Purchaser.*—One who has purchased land and paid a valuable consideration therefor in good faith, without notice of the fraudulent purpose of the grantor, acquires a good title, under section 2970, R. S. 1881, as against the grantor's creditors. *Carnahan v. McCord*, 67
2. *Same.—Judgment.—Lien.—Notice.*—Where a husband has caused land to be conveyed to his wife, after which a judgment is taken against him, such judgment does not constitute a lien as against an innocent purchaser from the wife, nor is such purchaser, in the absence of actual knowledge, bound to take notice of the judgment. *Ib.*
3. *Statute of Limitations.—Constructive Trust.*—Under section 292, R. S.

1881, an action to set aside a fraudulent conveyance must be brought within six years, and the operation of the statute can not be avoided by showing that by the conveyance a constructive trust was created for the grantor's creditors. *Stone v. Brown*, 78

4. *Same.—Concealment of Cause of Action.—When Sufficient to Avoid Statute of Limitations.*—The concealment of a cause of action, which, under section 300, R. S. 1881, will avoid the operation of the statute of limitations, must be affirmative in character, and the particular acts of concealment or misrepresentation must be set out in the pleading, together with the circumstances of the discovery, and the delay which has occurred must be shown to be consistent with diligence. *Ib.*
5. *Same.—Husband and Wife.—When Wife May Acquire Title as Against Creditors.*—Where a husband's land is encumbered by liens to the full value of his estate therein, and the wife, with money furnished by relatives and friends, has become the owner thereof by paying the claims of creditors who have acquired title by judicial sales and by conveyances from the husband and wife, and the subsequent payment of other liens she will hold the same freed from the claims of the general creditors of her husband. *Ib.*
6. *Same.—Purchase-Money.—Payment.—Proceeds of Crops.*—In such case, so far as the purchase-money was paid from the proceeds of crops raised on the land after it was conveyed to the wife, it was, in contemplation of law, paid by her, even though the husband assisted in producing the crops by managing the farm. *Ib.*
7. *Husband and Wife.*—A husband may cause land to be conveyed to himself and his wife, thus vesting in them a joint tenancy with all its legal incidents, and such conveyance is only impeachable at the suit of creditors on the ground of fraud. *Phelps v. Smith*, 387
8. *Same.—Tenants by Entireties.*—Where the husband has property subject to execution more than sufficient to pay his debts, he is not guilty of fraud merely because he procures land owned by him to be conveyed to himself and wife as tenants by entireties. *Ib.*
9. *Same.—Special Finding.—Fraud a Question of Fact.*—Where a cause of action depends upon the establishment of fraud, the special finding made in the case must state that there was fraud. Fraud is a question of fact, and can not be presumed, or inferred as a matter of law. *Ib.*
10. *Same.—Conveyance to Put Property Beyond Reach of Creditors.*—A statement in the special finding that the purpose of the parties in having the husband's property, the value of which is not given, conveyed to himself and wife as tenants by entireties, was to place the property beyond the reach of creditors, is not in itself a finding of the fact of fraud. *Ib.*
11. *Same.—When Conveyance not Fraudulent as to Creditors.*—A voluntary conveyance can not be adjudged fraudulent at the suit of creditors, where there is no actual fraud, if, at the time the conveyance was made or the suit was brought, the grantor had property subject to execution sufficient to pay his debts. *Ib.*
12. *Same.—Partnership.—Dissolution.—Husband and Wife.*—Where a partner, being indebted to his wife, executes to her a promissory note, she may, upon the subsequent dissolution of the firm and division of the partnership property, subject his property to sale in satisfaction of a judgment obtained on the note, and she is entitled to the proceeds as against partnership creditors having no specific lien. *Ib.*
13. *Same.—Action to Set Conveyance Aside.—Right to Maintain.*—It is the law of this State that a creditor, although he has not taken judgment, may successfully assail a fraudulent conveyance. *Ib.*

14. *Conspiracy.—To Defraud Creditors.—Sale.—Accounting May be Enforced.*—A person who enters into a conspiracy to defraud the creditors of a co-conspirator, and who, pursuant to the purpose of the conspiracy, obtains a judgment and secures a sale under an execution thereon of property which of right should have gone to the creditors of the co-conspirator, may be compelled to account for the proceeds of the sale. *Id.*

FREE GRAVEL ROAD.

See GRAVEL ROAD.

GIFT.

See REPLEVIN.

GRAVEL ROAD.

1. *Free.—Proceeding to Establish.—Meeting of Viewers.—Time.—Presumption.—Injunction.*—Where the order of the board of commissioners, made in a proceeding to establish a free gravel road, required the viewers to meet on the 22d day of August, 1881, and the report of the viewers recites that in pursuance of the order they met "on the — day of August, 1881," it will be presumed, in a suit to enjoin the collection of assessments, in the absence of proof to the contrary, that the viewers met on the day fixed. *Hobbs v. Board, etc., 376*
2. *Same.—Petition.—Signing.—Collateral Attack.*—Where there is no affirmative showing that the petition for a free gravel road was not signed preliminarily by five interested land-owners, as required by section 5092, R. S. 1881, and where the record of the proceedings before the board of commissioners recites that the petition was signed by the additional number required by section 5095, the petition in these respects will be held sufficient when questioned in a suit to enjoin the collection of assessments. *Id.*

GUARDIAN AND WARD.

See CRIMINAL LAW, 11.

HARMLESS ERROR.

See CRIMINAL LAW, 30; INTERROGATORIES TO JURY, 5.

HEIRS.

See DIVORCE, 3; HUSBAND AND WIFE, 6; MARRIED WOMAN; WILL.

HIGHWAY.

See GRAVEL ROAD; INTOXICATING LIQUOR; RAILROAD, 23, 24.

Corporate Franchise.—Abandonment.—National Road.—Easement.—A private corporation could acquire no more than an easement in the highway called the National Road, burdened with a duty to maintain a highway for the use of the public, and by its failure to perform the duties required by law it loses its rights in the highway, and will be deemed to have abandoned it to the public, without any judicial declaration to that effect, and the officers of the public may take possession and control of the road.

Western P. R. Co. v. Cent. U. Tel. Co., 229

HOUSE OF REFUGE.

See CRIMINAL LAW, 8 to 11.

HUSBAND AND WIFE.

See DECEDENTS' ESTATES, 3; DIVORCE; FRAUDULENT CONVEYANCE, 5 to 12; MARRIED WOMAN; NEGLIGENCE, 9; PRINCIPAL AND AGENT; REAL ESTATE.

1. *Conversion of Wife's Property.—Decedents' Estates.—Pleading.—Theory of*

Complaint.—Judgment.—Where a complaint against an administrator charges that the decedent, without the plaintiff's consent or knowledge, wrongfully appropriated to his own use the proceeds of a sale of land belonging to the plaintiff, who was the decedent's wife, it will not support a judgment if the proof shows that possession was taken with the plaintiff's consent, but with no intention on her part to divest herself of title, although upon a complaint proceeding on a proper theory she may recover. *Armacost v. Lindley, 295*

2. *Antenuptial Contract.—Consideration.—Marriage and Release of Marital Rights.—Descents.*—Where, in contemplation of marriage, a written antenuptial contract was executed between the prospective husband and his intended wife, reciting such fact, and that both have been married before, have children by such marriage, and have separate estates, and the parties agreeing therein that "the survivor of either shall take and hold no interest, or part of interest, by descent or otherwise, but the estate, both real and personal, shall descend to the heirs the same as it would if they had not married," the marriage and release of all marital rights or interest in the other's property constituted a valuable and sufficient consideration to support the contract, and the survivor (the widow) is barred from claiming any interest by descent or otherwise in the other's estate. *McNutt v. McNutt, 545*
3. *Same.—Consideration to Wife.*—In such case it is not necessary that the consideration should equal the dower right of a wife. *Ib.*
4. *Same.—Consideration Fixed by Parties.*—In the absence of fraud or mistake, the consideration fixed by the parties to a contract will be deemed sufficient. *Ib.*
5. *Same.—Impeachment by Lapse of Time.*—The fact that the promise to marry was made six years before the antenuptial contract was executed will not impeach the consideration of the contract. *Ib.*
6. *Same.—"Heir" of Husband.*—In such case, the fact that the husband died leaving no lineal descendant will not entitle the wife to any interest in his estate as "heir" or otherwise. *Ib.*
7. *Same.—Destroyed Contract.—Secondary Evidence.*—Evidence tending to show that an antenuptial contract once existed, and that it was destroyed by a party thereto, is sufficient to let in secondary evidence. *Ib.*

INDICTMENT.

See CRIMINAL LAW, 3, 4, 12, 24, 28, 31, 32.

INFANT.

See MASTER AND SERVANT; NEGLIGENCE, 5.

INJUNCTION.

See DEED, 3; DRAINAGE, 2, 6, 8; GRAVEL ROAD.

Ministerial Officer.—A ministerial officer, who is lawfully engaged in executing an order made by a court having jurisdiction of the proceeding in which the order is made, can not be enjoined.

Montgomery v. Wasem, 343

INSANITY.

See CRIMINAL LAW, 19 to 21; EVIDENCE, 3, 4; FRAUD, 3.

INTENT.

See CRIMINAL LAW, 30; WILL.

INSTRUCTIONS TO JURY.

See ARGUMENT OF COUNSEL, 2; CRIMINAL LAW, 21; PRACTICE, 1; RAILROAD, 17; VERDICT, 4, 5, 8.

1. *Refusal to Give After Indicating that it will be Given.*—The court may re-

fuse an instruction, if satisfied that it is erroneous, although it may have previously indicated that it would be given.

Louisville, etc., R. W. Co. v. Hubbard, 193

2. *Time of Asking.—Refusal to Give.—Practice.*—The trial court may properly refuse to give instructions asked after the argument has begun.
Evansville, etc., R. R. Co. v. Crist, 446

INSURANCE.

See CONTRACT, 5.

1. *Foreign Corporation.—Agent of.—Failure to Comply with Statute.—Misdemeanor.—Word "State" Includes District of Columbia.—Statute Construed.*—The District of Columbia is a "State" within the meaning of section 3765, R. S. 1881, making it unlawful for the agent of "any insurance company incorporated by any other State than the State of Indiana" to transact business in this State without first complying with the requirements of such statute.
State v. Briggs, 55
2. *Notice and Proofs of Loss.—Pleading.*—In an action on a policy of insurance, a general averment that the plaintiff has performed all the conditions of the policy on his part, dispenses with particular averments that notice was given and proofs of loss furnished to the insurer. Section 370, R. S. 1881.
Amer. C. Ins. Co. v. Sweetser, 370
3. *Same.—When Notice and Proofs not Necessary.*—After an insurance company has itself taken cognizance of a loss, and prepared such proofs as it deems essential to an adjustment, the insurer may assume, until notified to the contrary, that additional notice and proofs are not required.
Ib.
4. *Same.—Agreement to Accept Less than Whole Debt.—Consideration.*—Where the amount of a debt or liability is ascertained and uncontroverted, an agreement that the debtor may discharge his obligation by the payment of a sum less than the amount due, will not be enforced, unless it is supported by a new or independent consideration.
Ib.
5. *Same.—Compromise.*—In order that an executory contract growing out of a compromise may be enforced, there must have been an actual dispute founded upon a colorable right.
Ib.
6. *Same.—Assignment.—Subsequent Contract Between Insurer and Insured.*—The assignee of a policy of insurance is not bound by any agreement which the assignor may make with the insurance company, subsequent to the assignment, as to the amount which shall be accepted as a satisfaction of its liability.
Ib.

INTERROGATORIES TO JURY.

See VERDICT.

1. *Withdrawal.—Right of Opposite Party to Demand Answers.*—Where relevant and material interrogatories have been submitted to the jury on the motion of a party, they can not be withdrawn if the opposite party objects, but the latter has a right to demand that they be answered, and it is error to refuse to require answers.
Duestenberg v. State, ex rel., 144
2. *Rejection.*—Interrogatories to the jury may be submitted only when they call for a finding upon material and substantive facts. Interrogatories calling for a finding upon items of evidence should be rejected.
Louisville, etc., R. W. Co. v. Hubbard, 193
3. *Contradictory Answers.—Venire de Novo.*—The fact that answers to special interrogatories propounded to the jury are contradictory or inconsistent with each other, affords no ground for a *venire de novo*, as they neutralize each other and the general verdict will stand unimpaired.
Chicago, etc., R. W. Co. v. Ostrander, 259

4. *Same.*—*Objection to Reception of Verdict.*—*Waiver.*—*Practice.*—Where the jury has failed to answer a material interrogatory, or has answered it imperfectly, or has omitted to suitably verify the answer by the signature of its foreman, the proper practice is to object to the reception of the verdict and the accompanying papers pertaining to the interrogatories. If the verdict and accompanying papers are received without objection, the party complaining can not afterwards have a *venire de novo*, or other relief from the failure of the jury in any of the respects stated. *Ib.*
5. *Same.*—*Conclusions of Law.*—*Harmless Error.*—It is only concerning some particular question of fact material to the cause that an interrogatory can be rightly submitted to the jury under section 546, R. S. 1881. It is error to require a jury to answer an interrogatory which calls only for a legal conclusion; but the error will be harmless where the answer is immaterial. *Ib.*
6. *Same.*—*Presumptions in Favor of General Verdict.*—Where the answers of the jury to interrogatories are not conclusive of the merits of the controversy, all the presumptions are indulged in favor of the general verdict. *Ib.*

INTOXICATING LIQUOR.

See CRIMINAL LAW, 19 to 21, 28; RAILROAD, 11.

1. *License.*—*Sale from Wagon in Public Highway.*—An indictment charging the defendant with the offence of selling intoxicating liquors without a license, to be drank in and about his house, as such offence is defined in section 5320, R. S. 1881, is not supported by proof that the sale was made from an open wagon standing upon a public highway, in a county different from that in which the defendant lived and did business. *Schilling v. State, 200*
2. *Same.*—*"House" Defined.*—*A Wagon not a House.*—An open wagon is in no sense a house, within the meaning of the statute, as a house must be some sort of a building or enclosed structure. *Ib.*
3. *Same.*—*Construction of Statute.*—When the Legislature uses specific terms as to place, the courts must enforce the statute according to its terms, and can not, by judicial construction, supply legislative omissions. *Ib.*

JUDGMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; DEED, 3; DIVORCE; FORMER ADJUDICATION; FRAUDULENT CONVEYANCE, 2; HUSBAND AND WIFE, 1; JUSTICE OF THE PEACE; NEW TRIAL; PLEADING, 3, 7; PRACTICE, 2, 3, 7; SCHOOLS; SHERIFF'S SALE; SPECIAL FINDING; SPECIAL JUDGE; VERDICT.

1. *Relief from.*—*Surprise, etc.*—*Complaint.*—*Showing of Meritorious Defence.*—A complaint under section 396, R. S. 1881, to be relieved from a judgment on account of surprise, inadvertence or excusable neglect, is bad unless it shows a meritorious defence to the original action. *Rupert v. Marts, 72*
2. *Same.*—*Legal Remedies.*—*Vested Rights.*—*Obligation of Contracts.*—*Constitutional Law.*—There are no vested rights in the law generally, nor in legal remedies, and changes therein by the Legislature are not within the inhibition of section 10 of article 1 of the Constitution of the United States, unless of such a character as to materially affect the obligation of contracts. *Ib.*
3. *Same.*—*Review of Judgment.*—*Remedy May be Changed or Abolished.*—The statute providing for a review of judgments merely prescribes a remedy and this remedy the Legislature may change or take away altogether. *Ib.*
4. *Same.*—*Limitation of Action.*—*Disability.*—*Repeal of Statute.*—The statute

of 1881 (R. S. 1881, sections 615, 616), limiting the bringing of proceedings for review of judgments on account of error of law to one year after the removal of disability, repealed the prior statute allowing such proceedings to be brought within three years after the removal of disability; and all proceedings for review thereafter filed must be brought within the terms of the law of 1881, without regard to the time when the judgment was rendered. *Ib.*

5. *Same.—New Action After Failure.—Statute Construed.*—The provision in section 299, R. S. 1881, that if, after the commencement of an action the plaintiff fail therein, a new action may be brought within five years and be deemed a continuation of the first, for certain purposes, has no application to special proceedings for the review of judgments as provided by section 615. *Ib.*
6. *Upon Official Bond.—Lien upon Real Estate from Commencement of Action.—Surety.*—Under section 609, R. S. 1881, judgments on bonds payable to the State bind the real estate of the debtor from the commencement of the action. A surety in an official bond is a debtor within the meaning of this statute. *Fleenor v. Taggart, 189*
7. *Same.—Complaint.—Amendment by Filing New Pleading.*—A complaint upon a county treasurer's bond was filed in 1872, upon the relation of the board of commissioners and the county auditor, and a judgment was obtained. Upon appeal the judgment was reversed, and in 1875 a new complaint, containing an additional paragraph, was filed, it being founded upon the same cause of action. The board of commissioners was omitted as a relator, it having been held that it was improperly joined.
Held, that the new complaint was merely an amendment of the original pleading, and not the commencement of a new action, and that a judgment obtained thereon bound the real estate of a surety in the bond from the time the original complaint was filed. *Ib.*
8. *Void for Want of Jurisdiction.—Not Conclusive upon Either Party.*—A judgment in a former action, which is void for the want of jurisdiction, does not conclude either of the parties.
Louisville, etc., R. W. Co. v. Hubbard, 193
9. *By Default.—Complaint for Relief from.—Sufficiency of.*—A complaint under section 396, R. S. 1881, to be relieved from a judgment alleged to have been taken through mistake, inadvertence, etc., is bad if it fails to show the nature of the cause of action on which the judgment was rendered, and such pertinent facts as make it reasonably clear that the defendant had and has a meritorious defence thereto.
Hall v. Durham, 198
10. *By Agreement.—Broader Than Pleadings Authorize.*—A judgment by agreement will bind those by whose agreement it is entered, notwithstanding the pleadings would not, in a contested case, authorize such a judgment.
Indiana, etc., R. W. Co. v. Bird, 217
11. *Same.—Setting Aside.—Negligence of Judgment Defendant.—Innocent Assignees.*—A judgment by agreement will not be set aside where the judgment defendant has been guilty of laches and the rights of innocent third persons have intervened, although it is alleged that through the fraudulent representations of the judgment plaintiff the clerk entered the judgment for broader relief than was agreed upon by the parties. *Ib.*
12. *Same.—Reading in Open Court.—Presumption.*—It will be presumed, in the absence of a showing to the contrary, that a judgment was read in open court as the law requires, before being signed by the judge, and that it is such a judgment as the judge intended should be entered. *Ib.*

13. *Same.—Mistake.—Negligence of Parties.—Innocent Persons.*—As against innocent third persons, a party will be charged with negligence who fails to be in court when a judgment in which he is interested is read, or who, being in court, fails to call the attention of the court to mistakes in the entry of the judgment. *Id.*
14. *Same.—Notice.—Order-Book Entry.*—A purchaser of land and a judgment affecting it is not required to look beyond the order-book where the judgment is entered and attested by the signature of the judge, and if nothing is disclosed to put him upon inquiry, he is an innocent purchaser. *Id.*
15. *Merger.—Promissory Notes.—Mortgage.—Foreclosure.—Former Adjudication.*—Where a plaintiff declares upon a series of promissory notes, secured by mortgage, and executed by defendants severally liable only, and voluntarily elects to take a personal judgment against one of the defendants and only a decree of foreclosure against the others, the judgment is a merger of the whole cause of action against all the defendants in court, and a subsequent suit can not be maintained against any one of them. *Lawrence v. Beecher, 312*
16. *Same.—By Default.*—A judgment by default can not go beyond the cause of action stated, but it may embrace not only the principal matters alleged, but also all of the necessary incidental matters. *Id.*
17. *Action for Review.—Where Brought.*—An action to review a judgment must be brought in the court which rendered the judgment. *Jones v. Ahrens, 490*

JUDICIAL KNOWLEDGE.

See CRIMINAL LAW, 3.

JUDICIAL SALE.

See DEED, 3; SHERIFF'S SALE.

JURISDICTION.

See COUNTY, 3; CRIMINAL LAW, 7; DRAINAGE, 1; INJUNCTION; JUDGMENT, 8; JUSTICE OF THE PEACE.

JURY.

See INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; LANDLORD AND TENANT.

JUSTICE OF THE PEACE.

1. *Jurisdiction.—Judgment.*—The jurisdiction of a justice of the peace in civil actions is a limited one, and in all jurisdictional matters the requirements of the statute must be substantially complied with, or his judgments will be void. *Penrose v. McKinzie, 35*
2. *Same.—Summons.—Service Upon Non-Resident.—When Justice's Judgment Void.*—Where, in an action before a justice of the peace, the defendant resides in another State and in that State endorses upon a summons—not issued or directed to any officer, but delivered to the plaintiff's attorney by the justice—his acknowledgment of service and a waiver of jurisdiction, and the summons, so endorsed, is returned by the plaintiff's attorney, whereupon a judgment is rendered against the defendant by default, such judgment is void, and may be so declared in a direct proceeding for that purpose. Sections 1431 and 1450, R. S. 1881, considered. *Id.*

KIDNAPPING.

See CRIMINAL LAW, 31, 32.

LANDLORD AND TENANT.

Forcible Detention.—Proof.—Jury.—Verdict.—Where a complaint charges a peaceable entry upon real estate, and a forcible detention thereof, be-

fore the plaintiff can recover he must prove that the defendant holds the possession either by actual violence or such a show of force as is reasonably calculated to intimidate the plaintiff; and on failure of such proof the court may direct the jury to return a verdict for the defendant. *Gipe v. Cummins*, 511

LETTERS-PATENT.

See PATENT RIGHT.

LICENSE.

See INTOXICATING LIQUOR; MUNICIPAL CORPORATION, 7 to 9.

LIEN.

See FRAUDULENT CONVEYANCE, 2; JUDGMENT; MECHANIC'S LIEN; SHERIFF'S SALE, 4, 6.

LIFE-ESTATE.

See DEED, 2; WILL, 5.

MALICIOUS PROSECUTION.

1. *Malice.—Probable Cause.*—To sustain an action for damages for instigating or prosecuting a criminal action, which terminated in the plaintiff's acquittal, it must be shown that the defendant instituted the action in malice and without probable cause. *Paddock v. Watts*, 146
2. *Same.—Collateral Purpose in Instituting Prosecution.*—Where a criminal prosecution is commenced under circumstances which make it apparent that the person instituting the same had some collateral purpose in view, rather than the vindication of the law, a finding of a want of probable cause will be justified. *Ib.*
3. *Same.—Advice of Counsel.*—It is competent for the defendant, in order to disprove malice, to show that in instituting criminal proceedings he acted under the advice of counsel; but to obtain immunity he must have made a full and fair statement of all the facts known to him. *Ib.*
4. *Same.—Evidence.*—Where the prosecuting attorney testifies that upon the state of facts communicated to him by the defendant he advised the institution of criminal proceedings against the plaintiff, it is competent, on cross-examination, to ask him, as an expert, whether or not, if the facts were different in a specified particular from those stated by the defendant, he would have given the advice he did. *Ib.*

MARRIAGE.

See HUSBAND AND WIFE, 2.

MARRIED WOMAN.

See DECEDENTS' ESTATES, 3; FRAUDULENT CONVEYANCE, 5 to 12; HUSBAND AND WIFE; NEGLIGENCE, 9; PRINCIPAL AND AGENT; REAL ESTATE.

Mortgage.—Suretyship.—Heirs may Plead Coverture of Mother.—Estoppel of Husband.—Under section 5119, R. S. 1881, a mortgage executed by a married woman upon her separate real estate, to secure her husband's debt, is void as to her; and if she dies intestate, leaving children, they, being her privies both in blood and estate, may defeat the mortgage by pleading the coverture of their mother, the same as she might if living; but the husband, who joined in the execution of the mortgage, and received the benefit thereof, is estopped from making such defence as to his interest in the real estate. *Ellis v. Baker*, 408

MASTER AND SERVANT.

Dangerous Machinery.—Notice.—Pleading.—Complaint.—A complaint for damages for personal injuries, which proceeds upon the theory that

the plaintiff, an inexperienced boy, fifteen years of age, was put to work with machinery which his employers knew to be dangerous, but of which danger they did not inform him, is sufficiently specific as to the character of the machinery if it avers that there was danger in operating it, and that it was dangerous in the particular which caused the injury.

Danley v. Scanlon, 8

MEASURE OF DAMAGES.

See COUNTY, 4; FRAUD, 1, 3, 4.

MECHANIC'S LIEN.

1. *Notice to Owner.*—It is essential, in cases governed by the statute concerning mechanics' liens, that the owner of the property against which a lien for materials furnished is sought to be taken shall have notice.
Shafer v. Archbold, 29
2. *Foreclosure.—Complaint.*—A complaint to foreclose a mechanic's lien for labor alleged to have been performed in the erection of a building for a contractor, must show who owned the real estate, or interest to be affected, at the time the building was erected, and that the building was erected in pursuance of a contract, express or implied, with the owner.
Adams v. Buhler, 100

MEDICINE AND SURGERY.

See CRIMINAL LAW, 12 to 14.

MERGER.

See JUDGMENT, 15.

MISTAKE.

See ARBITRATION AND AWARD, 2; CRIMINAL LAW, 3; RAILROAD, 1.

MORTGAGE.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; JUDGMENT, 15; MARRIED WOMAN; SHERIFF'S SALE, 1 to 7, 12.

1. *Consideration.—Contract.—Care and Attention.*—V., being in ill health, was much at the house of Mrs. M., and at his request was nursed and cared for by her. In return for the services rendered and the kindness shown him he often promised her that, as a just compensation, he would, as soon as his father—who was aged and very wealthy, and from whom he had great expectations—should die, pay Mrs. M. a sufficient sum of money to remove all encumbrances from her homestead. After the death of his father, V. paid to Mrs. M. the amount required to remove the encumbrances from her property, declaring that he intended it as a compensation for her services and kindness to him. Fearing that she might again encumber the property at the request of her husband or others, and to prevent that from being done, V. proposed that a mortgage be executed to him for the amount paid, promising to release it when thought best, and to provide in his will for its cancellation, in case of his death. The mortgage was executed accordingly, but V. died without having released it or provided for its cancellation. Suit by his executors to foreclose the mortgage.
Held, that the mortgage is without consideration and can not be enforced, as the sum paid Mrs. M. was not a loan, but was the compensation for her care and services, as fixed by the valid and executed contract of the parties.
Colt v. McConnell, 249
2. *Same.—Judgment of Parties as to Consideration.—When Conclusive Upon Courts.*—Where the thing agreed upon as the consideration for a contract has no determinate money value, the judgment of the parties as to the sufficiency of the consideration will not be disturbed or annulled by the courts.
Ib.

3. *Same.*—*Parol Evidence.*—*Conduct, Declarations and Admissions.*—Parol testimony is competent to show the consideration of a mortgage, and evidence of the conduct and declarations of the parties in the course of their negotiations, and also the admissions of the mortgagee, are admissible. *Ib.*
4. *Same.*—*Attorney and Client.*—*Privileged Communications.*—Where both parties are present, declarations to an attorney are not privileged communications. *Ib.*
5. *Foreclosure.*—*Recording.*—*Subsequent Purchaser.*—Unless it affirmatively appears in a complaint for the foreclosure of a mortgage that a defendant claiming an interest in the mortgaged premises occupies the relation of a subsequent purchaser, an averment that the mortgage had been duly recorded is not essential. In such case the defendant must make his rights appear. *Mann v. State, ex rel., 383*
6. *Same.*—*Description.*—*When Land Presumed to be in this State.*—A deed or mortgage made in the form prescribed by the law of this State, and purporting to have been acknowledged in this State, between parties residing in the State, and containing nothing to indicate a contrary intention, will be presumed to be of land in this State. *Ib.*
7. *Same.*—*School Fund Mortgage.*—*Omission of County and State from Description of Land.*—*Presumption.*—Where both the county and State are omitted from the description of land embraced in a mortgage, but it appears on the face of the mortgage that it was executed by parties residing in a certain county in this State, for the purpose of securing a loan of school funds borrowed by the mortgagors through the auditor of that county it will be presumed, without more, that the land is there situate. *Ib.*
8. *Same.*—*Purchaser from School Fund Mortgagor.*—*Bound by Mortgage though not Recorded.*—One who claims through a mortgagor who has given a mortgage to secure school funds, is bound by the mortgage, even though it is not recorded according to the registry acts. *Ib.*

MUNICIPAL CORPORATION.

See EVIDENCE, 1.

1. *City.*—*Contract.*—*Complaint.*—*General Averment of Contract.*—*Presumption.*—In an action against a city for services rendered in securing the settlement of its indebtedness, where there is an averment in the complaint that such city entered into a contract with the plaintiff, whereby the latter undertook and agreed, in consideration, etc., it will be presumed that whatever was necessary to be done by the common council, in respect to its records in relation to entering into such contract, was properly done; and no additional averment as to the manner of executing the contract is necessary. *City of Logansport v. Dykeman, 15*
2. *Same.*—*Contract for Service.*—*Ordinance, Resolution or Writing not Necessary.*—In the transaction of mere matters of business, such as the purchase of goods necessary for the welfare of a municipal corporation, or the employment of persons or agencies to perform service for or protect the interests of the municipality, a formal ordinance, by-law or resolution is not necessary, nor is it essential that contracts of that character be in writing. *Ib.*
3. *Same.*—*Contract with Attorney.*—*Acceptance of Service.*—*Estoppel.*—Where the common council of a city, properly convened, enters into a contract with an attorney, or where an attorney is employed through the agency of a committee or other authorized person, and has performed services of which the municipality has accepted the benefit, it may not afterwards object that the contract was not in writing, or that the

vote of the council, on the question of employment, does not appear upon its records. *Ib.*

4. *Same.—Contracts within Scope of Corporate Power.—City Bound Same as Individual.*—In respect to contracts which are within the ordinary corporate power of a city, and in relation to which no statutory requirements are laid down, or mode of procedure prescribed, such city will be bound by its contracts, and will be affected by the principles of ratification, in the same manner as an individual. *Ib.*
5. *Same.—Bound by Implied Contracts.—Evidence.*—A municipal corporation will be bound by implied contracts or agreements to pay for services performed for it at its request, relating to matters within the scope of its powers, and such implied agreements may be deduced by inference from authorized corporate acts, without either a vote or writing. *Ib.*
6. *Same.—City Indebtedness.—Constitutional Limit.—Constitutional Law.—Contract for Service Creating Additional Debt.*—Although the debt of a city may be actually or nominally up to the constitutional limit, the provisions of article 13 of the Constitution will not operate to invalidate a contract made by its common council, agreeing to pay an attorney for services to be rendered in compromising or contesting any part of such indebtedness. *Ib.*
7. *Explosives.—Negligence.—Damages to Property of Citizen.—Liability of City.*—A city is not liable for damages caused to the property of a citizen by the negligent manner in which other persons, acting under permission from the mayor, fire explosives within the city.
Wheeler v. City of Plymouth, 158
8. *Same.—Failure to Enforce or Enact Ordinances.*—A municipal corporation is not liable for a negligent failure to enforce an ordinance, nor for omitting to enact ordinances. *Ib.*
9. *Same.—Liability for Act of Licensee.*—A municipal corporation is not liable for the acts of its licensees unless it is shown that an act authorized was dangerous in itself. *Ib.*
10. *Negligence.—Defective Street.—Knowledge of Defect.—Contributory Negligence.*—One can not recover for an injury caused by a defective street if he was guilty of negligence contributing to the injury; but mere knowledge on his part that there was a defect in the street does not of itself establish contributory negligence.
City of Richmond v. Mulholland, 173

NEGLIGENCE.

See COUNTY; JUDGMENT, 11, 13; MASTER AND SERVANT; MUNICIPAL CORPORATION, 7 to 10; RAILROAD, 1, 4, 7, 9, 16, 17, 22, 23; TELEGRAPH COMPANY.

1. *Town.—Obstruction in Street.—Contributory Negligence of Third Person.*—The contributory negligence of the driver and manager of a carriage will not defeat an action by one who was passively riding with him upon invitation, for personal injuries caused by the negligence of town authorities in leaving a dangerous obstruction in the street, without proper safeguards, if the person injured be himself without fault.
Town of Knightstown v. Musgrove, 121
2. *Same.—General Rule.*—One who sustains an injury without any fault of his own, or of some one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his acts, may look for compensation to any other person whose neglect of duty caused the injury, although

- the negligence of a third person, with whom he did not sustain the above relations, may have contributed thereto. *Ib.*
3. *Same.—When Negligence of Third Person is a Defence.*—Before the concurrent negligence of a third person can be interposed to shield another, whose negligence has caused an injury to one who was without fault, it must appear that the injured person and the one whose negligence contributed to the injury sustained such a relation to each other, in respect to the matter then in progress, that in contemplation of law the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured. *Ib.*
 4. *County.—Public Bridge.—Knowledge of Dangerous Condition.—Contributory Negligence.*—One who drives upon a public bridge, knowing it to be out of repair and dangerous, and in such a condition that a prudent person might reasonably anticipate injury, is guilty of such contributory negligence as will defeat an action against the county for damages, although the bridge was being used by the public and he exercised care in going upon it. *Morrison v. Board, etc., 431*
 5. *Reckless Riding upon Street.—Liability of Infant.*—An infant who negligently, and without any contributory fault on the part of a pedestrian, rides down and injures the latter while crossing a public street, is liable in damages. *Stringer v. Frost, 477*
 6. *Same.—Care Required of Foot Passengers in Crossing Street.*—A person about to cross a public street on foot must take proper precautions to avoid collision with horsemen or vehicles, but the degree of care required at a railroad crossing is not necessary. *Ib.*
 7. *Same.—Anticipation of Injury.—Contributory Negligence.*—Foot passengers have equal rights in streets with other persons, and one is not guilty of negligence who fails to anticipate, and take special precautions against, injury by persons riding or driving at an unusual and dangerous rate of speed. *Ib.*
 8. *Same.—Evidence.—Amount of Travel Upon Street.*—In an action by a foot passenger to recover for injuries sustained in being run down in a public street, evidence of the large amount of travel upon the street is admissible as tending to show the impropriety of the defendant's conduct in riding thereon at immoderate speed. *Ib.*
 9. *Injury Resulting in Death.—Implied Damage.—Defective Machinery.*—The law will imply pecuniary loss in some amount to the wife and child, by the death of the husband and father, who was, at the time, employed and presumably receiving wages, and, therefor able to discharge his obligation to support them; and a complaint, showing these facts, and that his death was caused by defective machinery owned and used by his employer, a railroad company, is sufficient. *Louisville, etc., R. W. Co. v. Buck, 566*
 10. *Same.—Injury on Sunday.—Recovery for.*—The fact that decedent received the injury on Sunday while engaged in common labor will not prevent a recovery therefor. *Ib.*

NEW TRIAL.

See ARGUMENT OF COUNSEL; CRIMINAL LAW, 15, 16.

1. *As of Right.—Action to Cancel Deed and Revest Title.*—In an action by a grantor to set aside a deed and revest title, on the ground that the conveyance had been obtained by fraud and undue means, a party is entitled to a new trial as a matter of right under the statute. *McKittick v. Glenn, 27*

2. *Newly Discovered Evidence.—Impeaching Evidence.*—A new trial will not be granted to admit the introduction of impeaching evidence.

Brown v. Grove, 84

NOTARY PUBLIC.

See DEPOSITION, 2.

NOTICE.

See DEPOSITION, 3; DIVORCE, 2; DRAINAGE, 4, 5, 9, 11; FRAUDULENT CONVEYANCE, 2; INSURANCE, 2, 3; JUDGMENT, 14; MASTER AND SERVANT; MECHANIC'S LIEN, 1; NEGLIGENCE, 4; PROMISSORY NOTE, 3, 4; RAILROAD, 23; TAXES, 2.

OFFICE AND OFFICER.

See COUNTY SUPERINTENDENT; INJUNCTION; JUDGMENT, 6, 7; TOWNSHIP TRUSTEE.

1. *County Commissioner.—Enlargement or Abridgment of Term of Office.—Legislative Power.*—The office of county commissioner not being provided for by the Constitution, the Legislature may enlarge, abridge, or otherwise change the term of that office, either temporarily or permanently, or may abolish it entirely. *State, ex rel., v. Bell, 1*
2. *Same.—Quo Warranto.—Pleading.—Complaint.*—In a *quo warranto* proceeding to obtain possession of the office of county commissioner, the point in litigation being the time of the commencement of the official term, a complaint or information which fails to aver when the board of commissioners of the county was organized, or when the term of the first incumbent of the contested office ended, is insufficient, and the want of such averments is not supplied by an allegation as to the time when the county was organized into commissioners' districts. *Id.*
3. *Benevolent Institutions.—President of Boards of Trustees.—Compensation.—Statute Construed.*—The acts of 1879 and 1883 (Acts of 1879, p. 4; Acts of 1883, p. 15), providing for the management of the State benevolent institutions, contemplate that the president of the boards of trustees shall receive the compensation provided for the president and also compensation as trustee of each of the institutions, as he is not only president of the several boards, but is also expressly made a trustee for each institution. *State, ex rel., v. Harrison, 300*
4. *Same.—Construction of Statute by Practice and Usage.—Acquiescence.*—Where a doubtful statute providing for the compensation of a public official, has received a construction by the Legislature and by the practice and usage of the administrative department of the government, in which construction the officer concerned has acquiesced, he is bound by the compensation thereby fixed. *Id.*
5. *Same.—Holding Two Lucrative Offices.—Constitutional Inhibition.*—The fact that the president of the boards of trustees of the benevolent institutions is entitled to compensation for his services as president of the boards and also to compensation for his services as trustee for the several institutions, does not make him the holder of two lucrative offices, as prohibited by the Constitution. *Id.*

OPEN AND CLOSE.

See ARGUMENT OF COUNSEL, 2.

OVERSEER OF POOR.

See TOWNSHIP TRUSTEE, 2.

PARTIES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; DIVORCE, 3; DRAINAGE, 10, 11; PRACTICE, 7.

Abatement.—Party Interested Made Defendant to Answer to Interest.—It affords

no ground for the abatement of an action, nor in bar thereof, that a party really or nominally interested is made a defendant to answer to his interest instead of suing as plaintiff.

City of Logansport v. Dykeman, 15

PARTITION.

1. *Statute of Limitations.—Pleading.*—The fifteen, and not the twenty years statute of limitations is applicable to a suit in partition, and where an answer sets out the facts showing that the suit was not commenced within fifteen years from the time the right of action accrued, it is good, although it is alleged as a conclusion that the action did not accrue within twenty years. *McCray v. Humes, 103*
2. *Same.—Adverse Possession.—Erroneous Legal Advice.*—Where the owner of an entire estate, acting under erroneous legal advice, asserts title to and conveys only an undivided half thereof, yields exclusive possession to the grantee, and voluntarily leaves other persons, who rely in good faith upon the same advice, in possession of the remaining half under an adverse claim of title, and the adverse possession so held by the grantee and the other persons is continued for more than fifteen years, a suit for partition will be barred. *Ib.*

PARTNERSHIP.

See FRAUDULENT CONVEYANCE, 12.

1. *Firm Note.—Endorsement by Individual Partners.*—A creditor who holds a note made by a firm and endorsed by the individual partners, has a valid joint obligation against the firm and at the same time a distinct, several and separate obligation against those who have signed as endorers. *Winslow v. Wallace, 317*
2. *Same.—Individual Property.—Conveyance to Firm to Secure Debt.*—A conveyance of separate property, executed in good faith by a partner to secure a debt owing by him to the firm of which he is a member, is valid as against the individual creditors of the partner. *Ib.*
3. *Same.—Appointment of Receiver.—Operates as Assignment.*—The appointment of a receiver for an insolvent firm operates to all intents and purposes as an assignment of the firm assets, with all the securities incident thereto, for the benefit of the firm creditors. *Ib.*
4. *Same.—Individual Property Conveyed to Firm.—Administration by Receiver.*—Where individual partners, being indebted to the firm, convey thereto their separate property, either as payment or as security for the payment of their *bona fide* debts, such property, upon the subsequent insolvency of the firm and the appointment of a receiver, vests in the receiver for the benefit of the creditors of the firm. *Ib.*
5. *Same.—Promissory Note.—Endorsement.—Preference of Creditor.*—A creditor who loans money to a firm upon promissory notes executed by the firm and endorsed by the individual partners, without knowledge that such partners had previously conveyed to the firm their separate property to secure their debts due to the firm, is not, upon the subsequent appointment of a receiver for the firm, entitled, as an individual creditor, to payment out of the separate property so conveyed, in preference to the creditors of the firm. *Ib.*

PATENT-RIGHT.

1. *Sale of.—Statute Regulating.—Validity of.*—The statute of this State (sections 6054, 6055, R. S. 1881), requiring vendors of patent-rights to file with the county clerk copies of the letters-patent, and to make an affidavit that the letters are genuine, and requiring, also, that promissory notes given for such rights shall contain the words "given for a patent-right," is valid. *Hankey v. Downey, 118*

2. *Same.—Statute Applies to Intangible Right.—Articles Manufactured Under Letters-Patent not Affected.*—The statute mentioned applies only to the intangible right evidenced by the patent; it has no application to the tangible article manufactured under letters-patent. *Ib.*
3. *Validity of Statute.*—The statute regulating the sale of patented rights is valid. *Pape v. Wright, 502*
4. *Same.—Broker.—Commission.—Illegal Act of Principal.*—Where a party employs a broker to procure a purchaser for patented rights, such broker, upon procuring such purchaser, is entitled to his commission whether a sale was made or not, although his principal had not complied with the statute regulating the sale of patent-rights, the broker having no knowledge of any intention on the part of his employer to violate the law. *Ib.*

PAYMENT.

See CONTRACT, 3, 6; FAMILY SETTLEMENT; FRAUD, 4; FRAUDULENT CONVEYANCE, 6; INSURANCE, 4; PLEADING, 6; PRINCIPAL AND AGENT; PROMISSORY NOTE, 3, 4, 5.

PERJURY.

See CRIMINAL LAW, 22 to 24; RECOGNIZANCE.

PERSONAL PROPERTY.

See REPLEVIN; SHERIFF'S SALE, 9, 11, 12; TAXES.

PHYSICIAN.

See CRIMINAL LAW, 12 to 14; EVIDENCE, 10.

PLEADING.

See CONTINUANCE; CRIMINAL LAW, 11; DRAINAGE, 9, 10; HUSBAND AND WIFE, 1; INSURANCE, 2; JUDGMENT, 1, 7, 9, 10; MASTER AND SERVANT; MECHANIC'S LIEN; MORTGAGE, 5; MUNICIPAL CORPORATION, 1; NEGLIGENCE, 9; OFFICE AND OFFICER, 2; PARTITION; PRACTICE; PROCEEDINGS SUPPLEMENTARY TO EXECUTION; RAILROAD, 22, 25, 26.

1. *Amendment of Complaint.—Relating Back.—General Rule.*—An amendment of a complaint relates back to the time at which the pleading was filed, except where the amendment sets up a claim or title not previously asserted, and involving the statute of limitations. *Fleenor v. Tuggart, 189*
2. *Additional Pleadings.—Opening Issues.—Discretion of Court.*—The party who assails the refusal of the trial court to open the issues in a cause to admit the filing of additional pleadings, must affirmatively show an abuse of discretion. *Louisville, etc., R. W. Co. v. Hubbard, 193*
3. *Complaint.—Theory.—Judgment.*—A complaint must proceed upon some single, definite theory, and a recovery will be upheld only when the evidence and the facts found support the case made by the complaint. *Armacost v. Lindley, 295*
4. *Written Instrument.—Loss of.—Excuse for not Filing Original or Copy.*—An averment that a written instrument sued upon is lost, is a sufficient excuse for failing to file such instrument or a copy with the complaint, without an additional averment that diligent search had been made. *Douthitt v. Mohr, 482*
5. *Same.—Contract.—Execution of.—Equivalent Terms.—Delivery and Acceptance.*—An averment that a person entered into a contract in writing is the equivalent of an averment that he executed the contract, and the execution of a written instrument implied a delivery and acceptance. *Ib.*
6. *Same.—Promissory Note.—Averment of Non-Payment.*—A complaint upon a promissory note must show that the note is unpaid, but this may

either be by a direct averment or by a statement of facts from which it may be fairly inferred. *Ib.*

7. *Defects Curable by Verdict.—Motion in Arrest.*—Where the defects in a complaint are of a character curable by verdict, the complaint is good as against a motion in arrest of judgment. *Jones v. Ahrens, 490*

PRACTICE.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; BILL OF EXCEPTIONS; CONTINUANCE; CRIMINAL LAW; DEPOSITION; DRAINAGE, 2; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; NEW TRIAL; PLEADING; SPECIAL FINDING; SUPREME COURT; TRIAL; VERDICT.

1. *Instruction.—Modification of by Court.*—The court may modify instructions asked, even after indicating, according to the requirement of the statute, what instructions would be given and what refused.

City of Loganport v. Dykeman, 15

2. *Judgment.—Defective Verdict.—Venire de Novo.—Motion in Arrest.*—Where the obstacle in the way of the rendition of judgment is a defective verdict, the correctness of the judgment can not be called in question on appeal unless a motion for a *venire de novo*, or, the whole record being defective, a motion in arrest, was made below.

Paddock v. Watts, 146

3. *Appeal.—Reserved Question of Law.—Statute Construed.*—Section 630, R. S. 1881, does not contemplate that a party may reserve for the decision of the Supreme Court, in the mode therein prescribed, a question of fact, or mixed question of fact and law; but the question reserved must be one of law only, which arose and was decided during the progress of the cause, and the record must show that an exception was reserved to the decision of such question at the time it was made.

Woodard v. Baker, 152

4. *Same.—Final Decision.—Reserved Question Upon.*—After the evidence has been fully heard upon the trial of the issues joined in a cause, and the court has announced its final decision and judgment in favor of the defendant, the plaintiff can not reserve that decision, under section 630, R. S. 1881, the same not being a question of law nor a decision during the progress of the cause within the meaning of that statute. *Ib.*

5. *Examination of Witness.—Objection to Question.—Statement of What it is Expected to Elicit.*—There is no available error in sustaining an objection to a question propounded to a witness, where no statement is made as to what testimony is expected in answer thereto.

Board, etc., v. Arnett, 433

6. *Objections to Evidence.—Must be Specific.*—A general objection to the admission of evidence on the ground that it is "incompetent, immaterial and irrelevant," presents no question for decision.

Stringer v. Frost, 477

7. *Defect of Parties.—Motion in Arrest.*—A motion in arrest of judgment presents no question as to a defect of parties. *Jones v. Ahrens, 490*

PREFERENCE OF CREDITOR.

See PARTNERSHIP, 5.

PRESUMPTION.

See CRIMINAL LAW, 17; DRAINAGE, 5; GRAVEL ROAD; INTERROGATORIES TO JURY, 6; JUDGMENT, 12; MORTGAGE, 6, 7; MUNICIPAL CORPORATION, 1; NEGLIGENCE, 9; PRINCIPAL AND AGENT, 3; RAILROAD, 5, 7, 16; SHERIFF'S SALE, 11; SPECIAL FINDING, 1; TELEGRAPH COMPANY, 2; TRIAL.

PRINCIPAL AND AGENT.

See MASTER AND SERVANT; PATENT RIGHT.

1. *Husband and Wife*.—The same principles govern dealings between a third person and an agent whose principal is his wife, as govern where the principal and agent are in other respects strangers; and one who purchases the wife's property through the agency of the husband must pay for it precisely as if he had purchased through any other agent. *Runyon v. Snell, 164*
2. *Same*.—*Sale of Real Estate*.—*Payment*.—*Unauthorized Acceptance of Promissory Notes*.—Where a husband, who is acting as the agent of his wife in the sale of her real estate, accepts his own note and the note of a third person for the purchase-price, without authority to do so, the acceptance of such notes does not constitute payment, and the wife is entitled to affirm the contract and recover of the purchaser the agreed consideration. *Ib.*
3. *Same*.—*Presumption*.—*Burden of Proof*.—There is no presumption that an agent, with authority to sell and accept payment for his principal, is authorized to receive his own notes or the notes of a third person in payment, but the burden is upon the purchaser to show affirmatively that the agent had such authority. *Ib.*
4. *Same*.—*Statute of Limitations*.—Where payment, *sub modo*, of an admitted indebtedness has in fact been made to the agent in such manner that the principal is entitled to affirm or repudiate it upon learning the facts, the statute of limitations does not begin to run until the facts are known or the payment disaffirmed. *Ib.*

PRIVILEGED COMMUNICATIONS.

See ATTORNEY AND CLIENT, 3; MORTGAGE, 4; REPLEVIN, 1.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See CRIMINAL LAW, 23, 24; RECOGNIZANCE.

1. *Complaint*.—*Necessary Averments*.—Where the complaint in proceedings supplementary to execution fails to show that an execution had issued to the sheriff of the county in which the debtor resides, or to the sheriff of the county in which the judgment was rendered, in case the debtor is a non-resident of the State, it is bad. *McKinney v. Snider, 160*
2. *Same*.—*Exemption*.—*Pleading*.—A general averment that the amount due from a third person to the execution defendant, together with the other property belonging to the latter, exceeded the amount which he was entitled to claim as exempt from execution, is merely the statement of a legal conclusion. *Ib.*

PROMISSORY NOTE.

See DECEDENTS' ESTATES, 1, 3; FRAUD, 4; JUDGMENT, 15; PARTNERSHIP, 1, 5; PRINCIPAL AND AGENT, 2, 3; TOWNSHIP TRUSTEE, 1.

1. *Negotiability*.—*Irregular Endorsement*.—One who, before delivery, writes his name upon the back of a negotiable promissory note, of which he is neither the payee nor endorsee, is, in the absence of explanatory evidence, liable to the payee only as endorser; but it is not so where the note is not negotiable by the law merchant, in the absence of a special contract to that effect. *Pool v. Anderson, 88*
2. *Same*.—*Endorsement by Stranger Before Delivery to Payee*.—*Liability*.—Where a person, not the payee of a promissory note not negotiable by the law merchant, places his signature on the back of the paper at or prior to the time of its inception, without making an express contract defining the nature and extent of his undertaking, he will be held liable to the payee as a surety or joint promisor. *Ib.*

3. *Same.*—*Notice of Non-Payment.*—A surety or joint promisor is bound to take notice of the default of his principal or joint maker, and as to either notice of non-payment is not necessary. *Ib.*
4. *Same.*—*Stipulation Waiving Notice of Non-Payment.—When Material.*—A stipulation in a promissory note waiving notice of non-payment is material only when the note is governed by the law merchant and capable of strict endorsement. *Ib.*
5. *Payment.—Cancellation.—Power of Court to Decree.*—Where the maker of a promissory note has fully paid the same, but the payee refuses to surrender it, and keeps it in his possession, claiming still to own it, the maker may maintain a suit in equity for its cancellation, notwithstanding he has a complete defence at law. *Fitzmaurice v. Mosier, 363*
6. *Same.—Note Executed by Mistake.*—Where a promissory note was executed by the maker in the belief that it was in payment of a debt due the payee, which belief was created by the representations of the latter or his attorney, whereas the debt was not that of the maker, but of a different person, a court of equity will decree the cancellation of the note. *Ib.*

QUO WARRANTO.

See OFFICE AND OFFICER, 2.

RAILROAD.

See NEGLIGENCE, 9, 10.

1. *Company not Liable for Mistake or Negligence of Receiver.*—In the absence of a statute imposing liability, a railway company is not answerable for injuries resulting from the mistakes or negligence of a receiver or his agents while operating the road. *Godfrey v. O. & M. R. W. Co., 30*
2. *Same.—Tickets Issued by Receiver.—Company not Bound to Honor and Redeem.*—In the absence of an express agreement to do so, a railway company is not bound to honor or redeem tickets issued by a receiver while he was operating the road. *Ib.*
3. *Same.—Carrier of Passengers.—Ticket Entitling Passenger to Travel in Reverse Direction.—Collection of Fare.*—Where a passenger deliberately enters upon a railroad train, with knowledge that his ticket entitles him to be carried in the reverse direction from that in which he proposes to go, and with ample opportunity to procure another, the conductor may refuse to honor such ticket, and has the right to collect fare. *Ib.*
4. *Animals.—Escape from Enclosure.—Contributory Negligence.*—In an action by a land-owner against a railroad company for the value of a horse which escaped from his enclosure and was killed by the defendant's train, the plaintiff is not guilty of contributory negligence if his fences were ordinarily and reasonably secure. *Dennis v. Louisville, etc., R. W. Co., 42*
5. *Same.—No Presumption that Animal will Leave Track.*—There is no presumption that a horse or other animal will step from the railroad track in time to avoid injury. *Ib.*
6. *Same.—Trespassing Animal.—Failure of Engineer to See.*—Where an animal enters upon a railroad track at a point where the road is securely fenced, and is killed by a passing train, the railroad company, if liable at all, is not liable in the absence of proof that the engineer or fireman saw the animal. *Ib.*
7. *Same.—Failure to Heed Signs and Gestures.—Negligence.*—Where there is no proof that the engineer saw the animal upon the track, it can not be said as matter of law that he was guilty of negligence because he failed to heed gestures and motions made by men along the way. *Ib.*

8. *Crossing.—Signals.—Contract.—Damages.*—Where a railroad company, desiring to cross the road of another company, agrees to provide proper signals at the crossing and a watchman to operate the same, and the parties to the contract afterwards agree upon a code of signals to be given by the watchman and observed by the parties, the company first mentioned is liable to the other company for damages caused by running its engine into the latter company's train, which is proceeding over the crossing in obedience to a signal giving it the right thereto.
New York, etc., R. W. Co. v. G. R. & I. R. R. Co., 60
9. *Same.—Contributory Negligence.—Anticipation of Breach of Duty.*—Until it appeared that there was a disregard of the signal by the defendant, the employees of the plaintiff were not guilty of negligence in failing to anticipate a breach of duty on the part of the defendant. *Ib.*
10. *Same.—Evidence.*—In such case it is competent to prove by a qualified witness the difference in value between a car as it was after it was repaired and as it was before it was injured. *Ib.*
11. *Same.—Intoxication of Engineer.*—In such case it is not error to admit evidence that the defendant's engineer had been drinking intoxicating liquor. *Ib.*
12. *Same.—Expert.—Opinion.*—A competent expert may give an opinion as to the distance at which it is safe to stop before going upon a crossing. *Ib.*
13. *Fence.—Agreement to Maintain.—Farm Crossing.—Liability for Animals Killed.*—Where a railroad company, in consideration of the grant of a right of way through a farm, agrees to erect and maintain a safe private crossing and a secure fence, it is bound to pay for animals killed by its trains, where they enter upon the track through the fault of the company in failing to fence the crossing in accordance with the contract.
Chicago & A. R. W. Co. v. Barnes, 126
14. *Same.—Leaving Crossing Gates Open.—Burden of Proof.*—If the gates at the crossing are left open by the land-owner, or by a wrong-doer other than the railroad company, that is a matter of defence. *Ib.*
15. *Street.—Ejectment.—Acquiescence.—Estoppel.—Damages.*—One who stands by and acquiesces in the construction of a railroad track across a street upon which his property abuts, and makes no objection until after the track becomes part of a completed railroad line and the interests of the public have attached, can not maintain ejectment, his remedy being a proceeding for damages.
Louisville, etc., R. W. Co. v. Soltsveddle, 257
16. *Negligence.—Communicating Fire to Adjacent Property.—Presumption.—Burden of Proof.*—No presumption of negligence arises against a railroad company from the fact of fire being communicated to adjacent property by an engine in use upon its line, and where negligence is charged the burden of proof is on the party complaining.
Chicago, etc., R. R. Co. v. Ostrander, 259
17. *Same.—Use of Wood in Coal-Burning Engines is Negligence.—Instruction to Jury.*—Where the fact that the use of wood in a coal-burning engine materially increases the danger of setting fire to and burning adjacent property is indisputably established, the court may properly instruct the jury that such use constitutes negligence. *Ib.*
18. *Right of Way.—Width.—Ambiguous Contract.—Parol Explanatory Evidence.*—What shall constitute a right of way for a railroad is not defined by law, but, like any other easement, it is a subject of contract, and when the contract, as to the width of the right of way, is general or ambiguous, the intention of the parties may be shown by parol evidence of their contemporaneous acts and declarations.
Indianapolis, etc., R. R. Co. v. Reynolds, 356

19. *Same.—Release.—Indefinite Right of Way.—Intention of Parties.—Evidence.—Ejectment.*—Where a land-owner executes a release to a railroad company for a right of way in general terms, the width not being given, and the railroad company takes possession of, fences and constructs its road upon a strip forty feet wide, and occupies the same for eighteen years, when it sets its fences out so as to include one hundred feet, the land-owner, in an action by him to recover the added sixty feet, may show by parol that the right of way released consisted merely of the forty feet originally occupied by the company. *Ib.*
20. *Right of Way.—Deed.—Acceptance.—Estoppel.*—Where a railroad company, in pursuance of a contract with a land-owner, demands and accepts and places upon record a deed for a right of way, it can not afterwards object to the sufficiency of the deed, or question the authority of the person making the contract.
Indiana, etc., R. R. Co. v. Fennell, 414
21. *Same.—Consideration for Deed.—Contemporaneous Parol Contract.*—Where, contemporaneously with the execution and acceptance of a deed to a right of way, the parties orally agree that the consideration for the deed is the payment of a certain sum of money by the railroad company, and the performance by it of certain conditions, within a reasonable time, the railroad company is liable according to the terms of that contract (which is assumed to be valid, as the question is presented), and a prior written contract between it and the land-owner becomes immaterial. *Ib.*
22. *Personal Injury.—Contributory Negligence.—Pleading.*—A general averment that the plaintiff was without fault, in a complaint to recover damages for a personal injury, makes the complaint good upon the question of contributory negligence, unless the facts specially pleaded clearly show that the plaintiff was negligent.
Evansville, etc., R. R. Co. v. Crist, 446
23. *Same.—Highway.—Obstruction of.—Knowledge of Danger.—Contributory Negligence.*—Where a railroad company has constructed its track along a public highway, which constitutes the only means of ingress and egress from the home of an adjacent land-owner, and has left excavations and embankments in the highway, in violation of its statutory duty to restore it to its former condition, the act of a member of the land-owner's family in using the highway under such circumstances does not of itself constitute such contributory negligence as will defeat a recovery against the railroad company for an injury. *Ib.*
24. *Same.—Failure to Restore Highway to Former Condition.—Liability for Injury.*—A railroad company which has violated its duty to restore a public highway, along which it has constructed its track, to its former condition, so far as it can effect a restoration by the exercise of reasonable care and skill, and has thus created a nuisance, is liable to one who, by reason of the obstruction left in the highway, combined with the fright of his horse at a hand-car negligently managed, sustains an injury while rightfully riding upon the highway. *Ib.*
25. *Eminent Domain.—Railroad Crossings.—Condemnation Proceedings.—Instrument of Appropriation.—Pleading.*—In proceedings by one railroad company to condemn and appropriate a right of way across the tracks of another, under subdivisions 5 and 6 of section 3903, R. S. 1881, the complaint or instrument of appropriation set forth the effort to reach an agreement as follows: "Having located the line and route of its said proposed extension of road over the lands and premises hereinafter described, and having attempted and failed, and being unable to agree with respondent in regard to the terms of, or in regard to the compensation therefor," the plaintiff did take and appropriate said way.

Held, that the effort to agree must be made on the three points: Compensation, points of crossing, and manner of crossing and connections, and such effort is a condition precedent to the exercise of the power to appropriate.

Held, also, that the instrument of appropriation must affirmatively show the agreement, or failure to agree, on each of these three points, and was, therefore, insufficient in this case.

Held, also, that the word "terms," as used in the instrument of appropriation, is not broad enough to cover the three essential points.

Lake Shore, etc., R. W. Co. v. Cincinnati, etc., R. W. Co., 573

26. *Same.*—*Waiver.*—*Pleading.*—There may be a waiver of an agreement, or of an effort to agree, but such waiver should be directly averred. *Ib.*

27. *Same.*—*Appeal as Waiver.*—An appeal is not a waiver of any objection seasonably and appropriately made. *Ib.*

28. *Same.*—*Quere.*—Does the statute confer the right upon a railroad corporation to appropriate and condemn a longitudinal part of the right of way of an existing railroad company? *Ib.*

29. *Same.*—*Nature of Civil Action.*—Condemnation proceedings are not in the strict sense an ordinary civil action. *Ib.*

REAL ESTATE.

See ATTORNEY AND CLIENT, 1, 2; DEED; JUDGMENT, 6, 7; LANDLORD AND TENANT; MECHANIC'S LIEN; MORTGAGE; NEW TRIAL; PARTITION; PRINCIPAL AND AGENT; SCHOOLS; SHERIFF'S SALE; TENANTS IN COMMON; WILL, 4, 5.

Trust.—*Parol Agreement.*—*Conveyance.*—Mrs. M., while married a second time and holding land obtained in virtue of her first marriage, orally agreed with the only child of her first marriage, a daughter, that they should unite in conveying the land to a third person, who should reconvey to the daughter one-fourth of the land, and reconvey the balance to Mrs. M. and her husband, to be by them held in trust and conveyed to Mrs. M.'s three children by her second marriage. A deed absolute in form was executed to Mrs. M. and her husband, and they conveyed the part deeded to them to two of the children in fee, to the exclusion of the third. Action by the latter to establish and enforce a trust.

Held, under section 2969, R. S. 1881, that no express trust in the land was created by the parol agreement, nor, upon the facts, can a constructive trust be raised; and as the land belonged to Mrs. M., subject to no valid condition, she had the right to dispose of it as she pleased.

Wright v. Moody, 175

RECEIVER.

See PARTNERSHIP, 3, 4, 5; RAILROAD, 1, 2, 3.

RECOGNIZANCE.

Execution of.—*Waiver of Objection to Prior Proceedings.*—*Forfeiture.*—Where the circuit court, of its own volition, assuming that a debtor has committed perjury in his examination in proceedings supplementary to execution, makes an order that, in default of bail, he shall be committed to jail to answer to that charge at the next term of court, and in pursuance of the order the debtor enters into a recognizance with surety for his appearance, without in any way questioning the legality of the order, all objections thereto are waived, and its invalidity can not be set up as a defence to an action on the recognizance.

Cunningham v. State, 433

RECORDING.

See MORTGAGE, 5, 8.

REDEMPTION.

See MORTGAGE; SHERIFF'S SALE.

REFORM SCHOOL FOR BOYS.

See CRIMINAL LAW, 8 to 11.

RELEASE.

See HUSBAND AND WIFE, 2; RAILROAD, 19.

REMAINDER.

See WILL, 5.

REMEDIES.

See JUDGMENT, 2, 3, 4.

RENTS AND PROFITS.

See TENANTS IN COMMON.

REPEAL OF STATUTE.

See JUDGMENT, 4.

REPLEVIN.

1. *Witness.—Decedent's Estate.—Matters Affecting.—Administrator's Sale.—Gift.*—Section 498, R. S. 1881, disqualifying certain persons to testify as to matters occurring during the lifetime of a decedent and affecting his estate, does not prohibit the plaintiff in an action of replevin, brought against a purchaser at an administrator's sale to recover possession of a horse sold as property of the decedent, from testifying that the decedent had made him a gift of the animal.

Durham v. Shannon, 403

2. *Same.—Evidence.—Declarations.—Res Gestæ.*—In such action, declarations of the decedent, made a day or two before he purchased the horse, that he intended to buy a horse for the plaintiff, and declarations made after the purchase, and while the animal was ostensibly in his possession, that he had bought the horse for the plaintiff, are competent as part of the *res gestæ*. *Id.*

RESCISSION.

See CONTRACT, 7; FRAUD, 1.

RES GESTÆ.

See EVIDENCE, 13; REPLEVIN, 2.

REVIEW OF JUDGMENT.

See JUDGMENT.

RIGHT OF WAY.

See RAILROAD, 8, 13, 18 to 21, 25 to 29.

SALE.

See DECEDENTS' ESTATES, 1; DEED, 3; FRAUDULENT CONVEYANCE, 14; INTOXICATING LIQUOR; PATENT RIGHT; PRINCIPAL AND AGENT; REPLEVIN; SHERIFF'S SALE.

SCHOOLS.

See COUNTY SUPERINTENDENT; CRIMINAL LAW, 2; TOWNSHIP; WILL, 1, 2, 3.

1. *Common School Lands.—Income From.—Suit to Recover.—County Commissioners.—Attorney's Fees.—Unlawful Diversion of Funds.—Liability of County.*—It is the duty of the board of county commissioners to prosecute an action against a township trustee who refuses to account for

the income of land belonging to the congressional township fund, and in the discharge of that duty it is proper for such board to employ attorneys and pay reasonable fees for their services out of proper funds; but such fees can not be paid out of the moneys recovered in such proceeding, as such moneys, under the compact between the United States and the State of Indiana, and under section 3 of article 8 of the State Constitution, are inviolably appropriated to the inhabitants of the proper township for the use of the common schools, and for any deduction made therefrom for attorney's fees or otherwise the county is liable, under sections 6 and 7 of the article cited, with interest from the date of diversion. *Board, etc., v. State, ex rel., 329*

2. *Same.—Judgment.—Res Judicata.*—A judgment of the board of commissioners rejecting a claim filed by a township trustee asking the board to pay into the county treasury, to the credit of the township, school funds unlawfully diverted to the payment of attorneys' fees, is not a bar to an action by the State to compel the board to make good the amount so unlawfully diverted. *Ib.*

SCHOOL FUND MORTGAGE.

See MORTGAGE, 7, 8.

SHERIFF'S SALE.

1. *Redemption by Subsequent Mortgagee.*—Under section 774, R. S. 1881, a mortgagee, although his mortgage is executed after a judicial sale of the property, may redeem from such sale, if his mortgage is recorded within the year for redemption. *Hervey v. Krost, 268*
2. *Same.—Redemption by Disqualified Person.—Estoppel.*—It is only the person holding the certificate of sale who may question the right of another to redeem, and if he, without objection, accepts the redemption money from a disqualified person, he is estopped from denying the validity of the redemption. *Ib.*
3. *Same.—Vacation of Sale.—Re-Sale.—Statute Construed.*—Section 770, R. S. 1881, providing that when real estate shall be redeemed by the owner or person claiming under him, the sale shall be vacated and the property again subject to sale, refers to redemptions made by the owner, his executor or administrator, his heirs or devisees, or one holding either the legal or equitable title under him or them, as provided in sections 768 and 769. *Ib.*
4. *Same.—Sale Extinguishes Lien.*—A sale made in pursuance of a judgment or decree of foreclosure extinguishes the lien of the judgment or mortgage as to the land sold, and the lien can be restored only when the sale has been vacated by a redemption by the persons contemplated by section 770. *Ib.*
5. *Same.—When Redemption Does not Vacate Sale.*—Redemption by a junior mortgagee, as such, or by any other person or persons except those included in section 770, does not vacate the sale and subject the property to re-sale on execution as if no sale had been made. *Ib.*
6. *Same.—Lien-Holder can not Redeem from his Own Sale and Re-Sell.*—A mortgagee or judgment lien-holder, after he has once sold land upon an execution or decree, can not redeem from his own sale, in case it produces less than the whole amount of his judgment, and thereby restore the lien of the judgment and subject the property to re-sale as if no previous sale had been made. *Greene v. Doane, 57 Ind. 186,* and cases following it, holding a contrary doctrine, were decided upon a statute differing from that now in force. *Ib.*
7. *Unperfected Bid.—Memorandum.—Re-Sale.*—Under a decree of foreclosure the mortgaged land was offered by the sheriff for sale. The judgment plaintiff bid less than one-fourth the amount of his judgment,

and the land was openly struck off to him. It is not shown that the sheriff made any memorandum of the sale or issued a certificate. Subsequently the sheriff re-advertised the land and sold it to the same bidder for the full amount of his judgment.

Held, that as it does not appear that the first sale was perfected, or that the sheriff exceeded his discretionary powers, that sale was not enforceable, and a re-sale was authorized. *Maheer v. Rena L. Ins. Co.*, 436

8. *Action to Set Aside.—Inadequacy of Price.*—Gross inadequacy of price, coupled with slight additional facts showing fraud, irregularity, or any other circumstance which may have operated to prevent the property from bringing its fair value, will avoid a sheriff's sale.

Wright v. Dick, 538

9. *Same.—Good-Faith Purchaser.—Irregularities.—Redemption.—Limitation of Action.—Waiver.*—Mere irregularities, such as the failure to levy upon and exhaust the debtor's personal property before resorting to his real estate, or the sale of his real estate in a body when it is susceptible of division and sale in parcels, will not necessarily render a sale void as against a good-faith purchaser. Such irregularities, as a general rule, can only be taken advantage of by an execution defendant, and will be deemed waived if acquiesced in by him during the statutory period of redemption. *Id.*

10. *Same.—Omission to Demand Sheriff's Deed.*—The mere omission of a purchaser to demand a deed from the sheriff at the expiration of the period for redemption, will not ordinarily defeat his absolute and continuous right to a conveyance after that time, where the sale has been properly made, the writ duly returned and a proper record thereof made. *Id.*

11. *Same.—Duty of Sheriff to Sell Personally.—Presumption.—Burden of Issue.*—Where, instead of selling personal property as required by section 730, R. S. 1881, a tract of real estate worth \$1,800 was levied on and sold to satisfy a balance of \$20 due on a judgment, such sale is presumptively void because of unfairness and oppression, and the law imposes on the purchaser the burden of showing that he took no advantage of the want of actual notice to the owner of the sale, and that there was no concealment, mistake or misapprehension which induced the owner to omit to redeem within the statutory period. *Id.*

12. *Same.—Equity.—Subsequent Mortgagees and Purchasers.*—In such case, subsequent mortgagees and purchasers of land so sold are equitably entitled to have their lien and rights enforced after the statutory period of redemption, the law presuming that they were misled by the sheriff's failure to perform his statutory duty. *Id.*

SPECIAL FINDING.

See FRAUDULENT CONVEYANCE, 9; TELEGRAPH COMPANY, 2.

1. *Silence as to Fact in Issue.—Presumption.*—If the court fails to find on all the facts within the issues, it will be assumed that the party upon whom the burden of the issue in respect to the omitted fact rested, failed to produce evidence in support thereof. *Stone v. Brown*, 78
2. *Signing.—Practice.*—Where the record shows that the name signed to a special finding is not the name of the judge who presided when the finding was filed, the finding is defective, and, if not made a part of the record by an order of court or by a bill of exceptions, it will be considered only as a general finding. *McCray v. Humes*, 103
3. *Correct Ultimate Conclusion of Law.—Erroneous Intermediate Conclusion not Available for Reversal of Judgment.*—If the ultimate conclusion of the trial court is right, upon the facts specially found, an intermediate

error in stating a conclusion of law, not of controlling force, will not authorize the reversal of the judgment.

Chicago & A. R. W. Co. v. Barnes, 126

4. *Conclusions of Law.—Supreme Court.—Practice.*—Where a question is reserved upon a conclusion of law, but not upon the special finding upon which it is based, the latter will not be reviewed in the Supreme Court.
Hayes v. Minnich, 253

SPECIAL JUDGE.

Oral Appointment.—Where the appointment of an attorney as special judge is not in writing, an objection to his competency to act must be sustained if promptly made; if objection be not seasonably made, it will be deemed waived, and the acts of the *de facto* judge upheld.
Greenwood v. State, 435

STATUTE.

1. *Construction.—Legislative Intention.*—To ascertain the intention of the Legislature in the enactment of a statute, all the sections of the statute and the several acts of the Legislature upon the same subject must be construed together; and in the construction of a doubtful statute, other statutes upon the same subject may be considered, although no longer in force.
State, ex rel., v. Harrison, 300
2. *Same.—Construction by Practice and Usage.*—For a consideration of cases relating to the construction of ambiguous statutes by the practice and usage of the departments of government, of public officers and of the people, see opinion.
Ib.
3. *Construction.*—Where the meaning of a statute is not clear courts will so construe it as to promote equity and justice.
Lake Shore, etc., R. W. Co. v. Cincinnati, etc., R. W. Co., 678

STATUTE CONSTRUED.

See COUNTY, 2; CRIMINAL LAW, 8, 10, 12, 23, 25, 32; DRAINAGE, 4, 7; FRAUDULENT CONVEYANCE, 4; GRAVEL ROAD, 2; INSURANCE, 1, 2; INTOXICATING LIQUOR; JUDGMENT, 1, 4 to 6, 9; JUSTICE OF THE PEACE, 2; MARRIED WOMAN; OFFICE AND OFFICER, 3, 4; PATENT RIGHT; PRACTICE, 3, 4; RAILROAD, 25; REAL ESTATE; REPLEVIN, 1; SHERIFF'S SALE, 1, 3, 4, 5, 11; STATUTE; TAXES; TELEGRAPH COMPANY; TOWNSHIP.

STATUTE OF FRAUDS.

See CONTRACT, 5.

STATUTE OF LIMITATIONS.

See FRAUDULENT CONVEYANCE, 3, 4; JUDGMENT, 4; PARTITION; PRINCIPAL AND AGENT, 4; SHERIFF'S SALE, 9.

STREETS AND ALLEYS.

See MUNICIPAL CORPORATION, 10; NEGLIGENCE, 1, 5 to 8.

SUBROGATION.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

SUMMONS.

See JUSTICE OF THE PEACE.

SUNDAY.

See NEGLIGENCE, 10.

SUPREME COURT.

See BILL OF EXCEPTIONS; CRIMINAL LAW, 1, 16, 17, 29; DEPOSITION, 3; INSTRUCTIONS TO JURY; PRACTICE; SPECIAL FINDING; SPECIAL JUDGE; TRIAL; VERDICT.

1. *Practice.—Record.—Bill of Exceptions.—Evidence.*—Where the record on its face affirmatively shows that all the evidence given on the trial is not contained therein, the Supreme Court will not consider any question growing out of the evidence, although the bill of exceptions concludes with the statement that "this was all the evidence given in the cause." *Saxon v. State, 6*
2. *Same.—Omitted Evidence.*—The Supreme Court has no power to make omitted evidence a part of a bill of exceptions or of the record. *Ib.*
3. *Question Depending Upon Evidence.—When not Presented.*—Where the decision of a question requires a consideration of the evidence, and the record fails to show that it contains all the evidence given in the cause, such question is not presented. *Woodard v. Baker, 152*
4. *Weight of Evidence.—Practice.*—The finding of the trial court will not be disturbed where there is evidence sustaining it. *McCallister v. Sigler, 476*

SURETIES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; JUDGMENT, 6; MARRIED WOMAN.

TAXES.

See TOWNSHIP.

1. *Personal Property.—Fraudulent List.—Penalty.*—A taxpayer who returns a false and fraudulent list of his personal property subject to taxation, is liable to the penalty prescribed by section 6339, R. S. 1881. *State, ex rel., v. Lawer, 162*
2. *Same.—Notice to Prosecuting Attorney.—Pleading.*—The notice which the statute provides the assessor shall give the prosecuting attorney of the taxpayer's offence, is no part of the definition of the offence, and need not be averred in the complaint to recover the penalty. *Ib.*
3. *Returning False List.—Penalty.*—One who returns a false and fraudulent tax list is liable to the penalty prescribed in section 6339, R. S. 1881, and must be prosecuted in the mode therein prescribed, and not by indictment. *Durham v. State, 514*

TELEGRAPH COMPANY.

1. *Negligence.—Penalty.*—Under the act of 1885 a telegraph company is not liable for the penalty prescribed therein where the only wrong proved is a negligent one. *Western U. Tel. Co. v. Jones, 361*
2. *Same.—Special Finding.—Presumption.*—In an action to recover a penalty imposed by law, it can not be presumed, in aid of a special finding, that the defendant violated the law; the presumption is that the law was obeyed. *Ib.*

TENANTS BY ENTIRETIES.

See FRAUDULENT CONVEYANCE, 8.

TENANTS IN COMMON.

1. *Occupying Claimant.—Rents and Profits.—Accounting.*—Where one occupies the whole estate in land and contests the claim of another to an interest therein, the latter is entitled, upon establishing his rights as a tenant in common, to an accounting for his just proportion of the use and occupation of the land. *Carver v. Fennimore, 236*
2. *Same.—Equity.*—An action by an excluded tenant against a co-tenant for an accounting for rents is a liberal and an equitable one, and

equitable defences may be made; and if the plaintiff receives actual compensation for the damages sustained he has no ground of complaint. *Ib.*

3. *Same.—Improvements Made Under Claim of Title.*—As a rule, the owner of an undivided interest in land, who occupies the whole estate in good faith, under claim and color of title to the whole, and who has made permanent and valuable improvements thereon, believing himself to be the owner of the whole estate, is accountable only for the fair rental value of the property as it was when it went into his possession. *Ib.*

4. *Same.—Improvements Made Pending Action.*—Pending an action to establish title to an undivided interest in unimproved land, A. purchased the same and made valuable improvements thereon, his grantor in good faith claiming title to the whole estate. While the action was still undisposed of B. purchased the land. Subsequently the plaintiff was adjudged to be the owner of an undivided one-third of the land. Suit against B. for an accounting.

Held, that, in the absence of equitable circumstances, the plaintiff is entitled to recover only on the basis of the rental value of the land before it was improved. *Ib.*

TENDER.

See CONTRACT, 7; DRAINAGE, 7; FRAUD, 2.

TIME.

See CONTRACT, 6; CRIMINAL LAW, 3; GRAVEL ROAD; HUSBAND AND WIFE, 5; INSTRUCTIONS TO JURY, 2.

TITLE.

See FORMER ADJUDICATION; FRAUDULENT CONVEYANCE; NEW TRIAL, 1; PARTITION; TENANTS IN COMMON.

TORT.

See CONVERSION.

TOWN.

See MUNICIPAL CORPORATION; NEGLIGENCE, 1, 2, 3, 5 to 8.

TOWNSHIP.

See TOWNSHIP TRUSTEE; WILL, 1 to 3.

1. *School Supplies.—Limitation upon Power of Trustee to Incur Debts.*—A township trustee can not, without first procuring an order from the board of county commissioners, as provided in sections 6006 and 6007, R. S. 1881, incur a debt in behalf of his school township for school furniture and apparatus, in excess of "the fund on hand" to which such debt is chargeable, and of "the fund to be derived from the tax assessed against his township for the year in which such debt is to be incurred." *Jefferson School Tp. v. Litton*, 467
2. *Same.—Statute Construed.*—The provision, "the fund on hand," as used in section 6006, means the money actually in the hands of the trustee, and the provision, "the fund to be derived from the tax assessed against his township for the year in which such debt is to be incurred," means the amount to be derived from the school tax assessed in the prior calendar year and collectible during the year in which the debt is to be incurred. *Ib.*
3. *Same.—Legalizing Act of 1883.*—Under the act of 1883 (Acts of 1883, p. 114), an indebtedness incurred in 1882 by a township trustee for suitable and necessary school supplies, in violation of sections 6006

and 6007, is legalized and made an enforceable obligation against the township. *Id.*

TOWNSHIP TRUSTEE.

See COUNTY, 2; COUNTY SUPERINTENDENT; TOWNSHIP; WILL, 1, 2, 3.

1. *Void Promissory Notes.—Action Upon Official Bond.*—Promissory notes illegally executed by a township trustee are void in their inception. Holders are bound to know this as matter of law, and they can not maintain an action upon the official bond of the trustee.

Grimsley v. State, ex rel., 130

2. *Compensation.—Overseer of Poor.*—A township trustee, who has been paid two dollars per day for his services out of the township fund, is not entitled to an additional compensation, for the same time, as overseer of the poor.

Board, etc., v. Templeton, 369

TRIAL.

Holding Cause Under Advisement.—Delay.—Presumption.—When a judge holds a cause under advisement for more than sixty days without objection, the presumption will be indulged that he had a lawful excuse for the delay.

McCray v. Humes, 103

TRUST AND TRUSTEE.

See ATTORNEY AND CLIENT, 1, 2; FRAUDULENT CONVEYANCE, 1, 3; REAL ESTATE; WILL, 1, 2, 3.

USAGE.

See OFFICE AND OFFICER, 4; STATUTE.

VARIANCE.

See CRIMINAL LAW, 28.

VENDOR AND PURCHASER.

See ATTORNEY AND CLIENT, 1, 2; DEED; FRAUD; FRAUDULENT CONVEYANCE; JUDGMENT, 14; MORTGAGE; REAL ESTATE; SHERIFF'S SALE.

VENIRE DE' NOVO.

See INTERROGATORIES TO JURY, 3; PRACTICE, 2; VERDICT, 6, 7.

VERDICT.

See CRIMINAL LAW, 5; INTERROGATORIES TO JURY, 3 to 6; LANDLORD AND TENANT; PLEADING, 7; PRACTICE, 7.

1. *Interrogatories to Jury.*—A general verdict will stand as against answers to interrogatories, unless some fact fatal to a recovery is stated in such answers. *New York, etc., R. W. Co. v. Grand Rapids, etc., R. R. Co., 60*
2. *Special.—Judgment on.—Practice.*—A party who deems himself entitled to judgment on a special verdict should move for judgment, and, if unsuccessful, preserve the question by an exception.

Johnson v. Culver, 278

3. *Same.—Separate Causes of Action.—Motion for Judgment on Each.*—Where the causes of action are clearly distinct, it is proper to move for judgment on each cause. *Id.*
4. *Same.—Discretion of Trial Court.*—It is discretionary with the trial court, after instructions have been asked and argued, to grant or refuse a request for a special verdict. *Id.*
5. *Same.—Instructions to Jury.—Practice.*—Where a special verdict is directed, instructions to the jury, except as to rules of evidence and the frame of the verdict, are dispensed with, and available error can not be predicated upon instructions relating to the general rules of law. *Id.*
6. *Special.—Improper Matter.—Venire de Novo.*—It is the office of a special verdict to find the facts. Evidence or conclusions of law inserted

therein will be disregarded, and if, stripped of improper matter, the verdict is yet sufficient to support a judgment either way under the issues, a motion for a *venire de novo* will not lie.

Indiana, etc., R. W. Co. v. Fennell, 414

7. *Same.—Defective Verdict.—Motion for New Trial.*—If a special verdict fails to find facts established by the evidence, or finds facts not established, the remedy is by a motion for a new trial, and not by a motion for a *venire de novo*. *Ib.*
8. *Special.—Instructions.—Practice.*—Where the jury are required to return a special verdict, general instructions upon the law of the case are not proper, and error predicated upon the giving or refusal to give such instructions is not available. *Louisville, etc., R. W. Co. v. Buck, 566*
9. *Same.—Defects.—How Reached.*—Where the jury return a special verdict, the failure to find as to any facts in issue is not ground for a *venire de novo*. Courts will assume a failure of proof as to the facts not found, on such motion, though such omission might be ground for a new trial. *Ib.*

WAIVER.

See DEED, 3; FRAUD, 5; INTERROGATORIES TO JURY, 4; JUSTICE OF THE PEACE, 2; PROMISSORY NOTE, 4; RAILROAD, 26, 27; RECOGNIZANCE; SHERIFF'S SALE, 9; SPECIAL JUDGE.

WASTE.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

WIDOW.

See DECEDENTS' ESTATES, 8; WILL, 5.

WILL.

See DECEDENTS' ESTATES, 3.

1. *Devise to Township for Support of Common Schools.—Intention of Testator.*—Where a devise is made to a township for the support of common schools, it clearly appears that the devise is to the school township. *Skinner v. Harrison Township, 139*
2. *Same.—Township Capable of Taking under Will.—Trustee.*—A township in this State is made by statute a distinct municipal corporation for school purposes, and it is capable of becoming a trustee to receive funds bequeathed to it for the use of the public schools. *Ib.*
3. *Same.—Latent Ambiguity as to Devisee.—Extrinsic Evidence.*—Where a testator devises property "to Harrison township," and it is made to appear by evidence that there are many townships of that name in the State, it is competent, in order to remove the obscurity in the testator's intention caused by the extraneous circumstances, to show by extrinsic evidence that the testator resided in Harrison township in a certain county, and that he sustained a relation to that township different from all others of like name. *Ib.*
4. *Construction.—Effect of Subsequent Clauses upon Devise.*—Where an estate in fee simple is devised in one clause of a will in clear and decisive terms, it can not be taken away or cut down by raising a doubt upon the meaning of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving the estate in fee. *O'Boyle v. Thomas, 243*
5. *Vested Remainder.—Survivorship.*—Where a devise of land is to a widow during her natural life, and at her death to the son of the testator, if he be living, and if he be dead then to his widow until her death

or marriage, and at her death or marriage then to his heirs, and, if there be no heirs living to the heirs of the testator, the words of survivorship relate to the death of the testator, and the son takes an estate in fee simple in remainder, which vests immediately upon the death of the father, but which he can only enjoy in possession after the termination of the life estate of his mother. Upon a conveyance of the life estate to the son by the mother, the former would become entitled to possession of the land. *Hoover v. Hoover, 498*

WITNESS.

See CRIMINAL LAW, 18, 19, 21; DEPOSITION; DIVORCE, 3; EVIDENCE; PRACTICE, 5, 6; RAILROAD, 12; REPLEVIN.

Discretion of Court.—It is within the discretion of the trial court to hear the testimony of a witness although not offered until after the evidence had been closed. *McNutt v. McNutt, 545*

END OF VOLUME 116.

Ex. 4. 1.



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